Case No. S274147

IN THE SUPREME COURT OF CALIFORNIA

DAVID MEINHARDT,

Petitioner and Appellant,

vs.

CITY OF SUNNYVALE, SUNNYVALE PERSONNEL BOARD,

Respondent,

SUNNYVALE DEPARTMENT OF PUBLIC SAFETY,

Real Party in Interest.

After a Decision by the Court of Appeal for the Fourth District, Division One Court of Appeal Case No. D079451
Dismissing an Appeal of a Judgment Entered in
the Superior Court of Santa Clara County
Superior Court Case No. 19CV346911
Hon. Peter Kirwan

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANT'S OPENING BRIEF ON THE MERITS; DECLARATION OF MICHAEL SHIPLEY

KIRKLAND & ELLIS LLP

*Michael Shipley (SBN 233674)
mshipley@kirkland.com
Nathaniel Haas (SBN 324305)
nathaniel.haas@kirkland.com
555 S. Flower Street
Los Angeles, CA 90071
Telephone: (213) 680-8400

MESSING ADAM & JASMINE LLP

Gregg McLean Adam (SBN 203436)
gregg@majlabor.com
235 Montgomery St., Suite 828
San Francisco, CA 94104
Telephone: (415) 266-1800

Attorneys for Petitioner and Appellant David Meinhardt

REQUEST FOR JUDICIAL NOTICE

Pursuant to California Rules of court 8.520(g) and 8.252(a) and Evidence Code sections 452, subdivision (c) and 459, subdivision (a), Petitioner and Appellant Officer David Meinhardt hereby requests that this Court take judicial notice of legislative history materials in connection with Appellant's Opening Brief on the Merits.

Officer Meinhardt requests that the Court take judicial notice of legislative history materials regarding the enactment of Code of Civil Procedure section 1094.5. These materials are more particularly listed in, and attached to, the Declaration of Michael Shipley, Appendix and Exhibits 1 through 6 are attached herein.

The materials are relevant to the pending Appeal before the Court because they demonstrate that there is nothing in the legislative history of the provision currently codified at Code of Civil Procedure section 1094.5, subdivision (f) that evidences any intent that the rule of separate entry of final judgments in civil actions does not also apply in administrative mandate cases.

This Court routinely takes judicial notice of legislative history documents under the authority of Evidence Code sections 452, subdivision (c) and 459, subdivision (a). (See, e.g., *Heckart v. A-1 Self Storage, Inc.* (2018) 4 Cal.5th 749, 767 fn. 8; *White v. Davis* (2003) 30 Cal.4th 528, 553 fn. 11.) The Court will "generally grant requests to notice legislative history documents, meaning we will at least *consider* them, even if [may] ultimately find some to be of little or no help in ascertaining legislative intent." *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1172 fn. 5, emphasis original.) Moreover, a judicial decision, like the opinion of the Court of Appeal here, adopts rules that diverge from settled law in substantial or radical

ways, the Court has considered an absence of support for such arguments in the Legislative history to be relevant. (*Id.* at p. 1193; *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 163.)

* * *

Officer Meinhardt thus respectfully requests that the Court grant this Request for Judicial Notice.

Dated: August 30, 2022

Respectfully Submitted,

KIRKLAND & ELLIS LLP

By: _____
Michael Shipley (SBN 233674)

Attorneys for Petitioner and Appellant David Meinhardt

DECLARATION OF MICHAEL SHIPLEY IN SUPPORT OF PETITIONER'S REQUEST FOR JUDICIAL NOTICE

I, Michael Shipley, declare:

1. I am an attorney admitted to practice before the courts of the State of California, and I am counsel for Petitioner. I have personal knowledge of the facts stated herein, and I could and would competently testify to them if called as a witness.

2. I submit this declaration in support of Petitioner's Opening Brief on the Merits.

3. Petitioner's Opening Brief discusses the legislative history materials regarding the enactment of Code of Civil Procedure section 1094.5. To assist the Court in evaluating Petitioner's Opening Brief, Petitioner has compiled the legislative history of 6 different enactments, which constitute the full history of the section 1094.5. To avoid burdening the Court with an unwieldy large paper filing, the exhibits to this declaration (Exhibits 1 through 6) have been submitted herewith in electronic media containing a bookmarked appendix .pdf. Petitioner will also submit an electronic copy of the document with the Court's e-filing provider. Petitioner will file a paper copy of the exhibits if the Court would find it useful.

4. Exhibits 1 through 6 are true and correct copies of the legislative history documents related to the enactment of Code of Civil Procedure section 1094.5. A detailed index of the exhibits is attached as Appendix 1 to this declaration.

5. These documents were gathered at my firm's request by Legislative History & Intent, a legislative history search firm that conducts research and gathers historical materials related to legislative enactments. I am informed and believe that they procured the above documents by searching

publically available Senate and Assembly committee bill files, author bill files, and the Governor's chaptered bill file, as well as bill books, books of annual statutes, and Assembly and Senate Journals as all of those sources are maintained in the regular course of the State's business.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on August 30, 2022, at Pasadena, California.

Michael Shipley

PROPOSED ORDER GRANTING PETITIONER'S REQUEST FOR JUDICIAL NOTICE

The Supreme Court having reviewed and considered the Petitioner's Request for Judicial Notice orders as follows**:**

It is on this _____ day of _____, 2022, that the Petitioner's Request for Judicial is **GRANTED**.

_____

Honorable Judge of the California Supreme Court

APPENDIX TO THE
DECLARATION OF MICHAEL SHIPLEY
EXHIBIT NO. ORDER

EXHIBIT	DOCUMENT	PAGES
1	Tenth Biennial Report to the Governor and the Legislature, Judicial Council of California, 1944-12-31	009-044
2	Administrative Agencies Survey Appendix, Judicial Council of California, 1944-12-31	045-077
3	Codified Text of Statutes of California Chapter 868, 1945	078-080
4	Legislative Counsel's Analysis of S.B. 735, 1945-06-09	081-082
5	AG Analysis of S.B. 736, 1945-06-07	083-085
6	Bill Introduction Text of S.B. 736, 1945-01-25	086-087

APPENDIX TO THE
DECLARATION OF MICHAEL SHIPLEY
ALPHABETICAL ORDER

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TENTH BIENNIAL REPORT

JUDICIAL COUNCIL OF CALIFORNIA

TO THE

GOVERNOR AND THE LEGISLATURE

DECEMBER 31, 1944

41000

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TENTH BIENNIAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA

PART ONE

ADMINISTRATIVE AGENCIES SURVEY

The 1943 Legislature (Deering's General Laws, 1944, Act 40) directed that a study and report be made by the Judicial Council concerning the procedure of administrative boards, commissions and officers. The Council has undertaken a thorough and extensive study of this subject, and its report and recommendations are included herein as Part II.

COURT BUSINESS

As Part II of our report is necessarily of considerable extent, in order to make a compensating saving of labor and materials during the war, the customary statistical data for the courts of the State have been omitted. Complete information for July 1, 1942 to June 30, 1944 has been compiled, however, and the tabulations are available in the office of the Judicial Council for reference purposes.

RULES

In 1941 the Legislature enacted Section 961 of the Code of Civil Procedure and Section 1247k of the Penal Code, which gave the Judicial Council power to prescribe rules for appellate procedure in civil and criminal actions and proceedings in all courts of the State. These sections directed that the rules be reported to the Fifty-fifth Regular session of the Legislature, to become effective in 90 days after being so reported, and that thereafter all laws in conflict therewith be of no further force or effect.

To carry out the purpose of this legislation within the limited period afforded, it was necessary to utilize the experience of judges and lawyers to the fullest possible extent. The Judicial Council vested supervisory authority in its Committee on Appellate Rules, consisting of Justice John W. Shenk, chairman, and Justices John T. Nourse, Charles R. Barnard, B. Rey Schauer and Maurice T. Dooling, Jr. Mr. B. E. Witkin, Reporter of Decisions of the Supreme Court and District Courts of Appeal, was appointed to act as Draftsman of the Rules on Appeal, and Edward L. Barrett, Jr., John J. Eagan, and Walter B. Chaffee, were appointed research assistants, for varying periods. A number of committees of the State Bar undertook the study and criticism of the preliminary drafts of the rules.

The tentative draft of the Rules on Appeal was published in the State Bar Journal, thus giving the entire bench and bar an opportunity to make criticisms and suggestions.

The Rules on Appeal adopted by the Judicial Council were reported to the 1943 Legislature, and became effective July 1, 1943. These rules, with explanatory notes, were promptly printed in pamphlet form and made available to the courts and members of the bar without cost.

The rules on original proceedings in reviewing courts, including rules for review of State Bar proceedings, were amended so far as possible within the constitutional and statutory limitations. These rules, numbered consecutively following the Rules on Appeal, also became effective July 1, 1943, and were included in the pamphlet of Rules on Appeal.

The rules, as adopted, were confined to appeals from the superior court, a limited revision of the rules governing original proceedings and State Bar proceedings. Special committees are now engaged in formulating rules governing appeals from municipal courts in civil cases and revising the rules for the appellate departments of the superior court. Prospective recommendations for repeal and amendment of statutes regulating municipal court appeals in civil cases are being considered.

Although the enabling statutes provide that on the effective date of the Rules on Appeal all laws in conflict therewith shall be of no further force or effect, it was thought desirable that these superseded statutes be expressly repealed, and accordingly a proposed repeal statute will be presented to the 1945 Legislature.

Also, pursuant to the provisions of Chapter 400, Statutes of 1943, the Judicial Council prepared and adopted rules, effective October 1, 1943, determining the length of the period of rehabilitation in the proceedings authorized under Sections 4852.01 to 4852.2 of the Penal Code.

TENTH BIENNIAL REPORT OF THE JUDICIAL COUNCIL OF CALIFORNIA

PART TWO

REPORT ON THE ADMINISTRATIVE AGENCIES SURVEY

I. Introduction

The 1943 Legislature directed the Judicial Council to undertake a study of the procedure of California administrative agencies and of the judicial review of their decisions. This delegation was contained in Statutes of 1943, Chapter 991 (Deering's General Laws, 1944, Act 40), which reads as follows:

> "SEC. 1. The increasing complexity of economic relationships has resulted in a rapid extension of the field of administrative law, and a growing need for the development of an administrative procedure, particularly including the review of administrative decisions, that assuredly will afford adequate protection to the citizen without impairment of expedition in the transaction of the public business. Much research in relation to the method and manner of the review of such decisions has been done by the State Bar of California, the American Bar Association, the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other agencies and groups. It is timely that the results of this research be correlated and applied to the problem as it exists in California and an adequate and comprehensive plan formulated for submission to the Legislature for its consideration and action.
>
> "SEC. 2. The Judicial Council is authorized and directed to make a thorough study of the subject, in all its aspects, of review of decisions of administrative boards, commissions and officers in this and other jurisdictions, formulate a comprehensive and detailed plan by the council found suitable to the needs of this State, and report thereon with its recommendations not later than the tenth legislative day of the Fifty-sixth Regular Session of the Legislature, to the Governor and the Legislature, the report to include drafts of such legislative measures as may be calculated to carry out and effectuate the plan. The council may include in its report recommendations as to changes in administrative procedure which may not require legislation as well as those which will require legislation for their effectuation.
>
> "SEC. 3. All departments, commissions, boards, agencies, officers and employees of the State shall give the Judicial Council ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to them or to data within their knowledge or control."

A similar direction to the Judicial Council had been made by the 1941 Legislature (Stats. 1941, Ch. 1190). No action was taken under the 1941 statute, however, because no funds were provided for the necessary technical staff to carry out the survey (Ninth Report of the Judicial Council of California (1943), p. 5). This delegation of responsi-

bility to the Judicial Council, both in 1941 and again 1943, constituted only one part of a general legislative interest in the field of administrative procedure. In 1941 the Legislature enacted Secs. 720-725.4 of the Political Code, providing for the publication of administrative rules and regulations in a publication to be known as the California Administrative Code. The responsibility for carrying out this program was vested in a Codification Board to which the 1943 Legislature appropriated the sum of $70,000 during the period of 1943-1945 (Stats. 1943, Ch. 1060). In addition to the interest in administrative procedure which has recently been manifested by the Legislature, the Attorney General's office and the various State agencies themselves have been active in the attempt to improve their procedure. The State Bar of California for several years has had a very active committee on administrative agencies and tribunals which has earnestly studied the problems of administrative procedure with reference to the California agencies.

The Legislature's request that an investigation of administrative procedure be made by the Judicial Council is but a part of a nation-wide attempt to improve the operation of both Federal and State agencies. The studies made by groups in other jurisdictions have been examined and carefully considered in connection with the Council's work. These studies have been summarized in an appendix to this report (See Appendix B). Among the organizations which have engaged in this type of work are: the United States Attorney General's Committee on Administrative Procedure, the American Bar Association, the National Conference of Commissioners on Uniform State Laws, a staff working under Commissioner Robert M. Benjamin in New York, the Revisor of Statutes in Minnesota, the Ohio Administrative Law Commission and the Illinois Administrative Practice and Review Commission.

A detailed statement of the methods used by the Judicial Council in this survey has been appended to this report (See Appendix B, p. 48). The ground work was done by a special three-man committee of the Council consisting of Justice John T. Nourse, Chairman, and Judges C. J. Goodell and Maurice T. Dooling, Jr. In its work the committee was assisted by a research staff under the direction of Ralph N. Kleps, of the San Francisco Bar. This staff consisted of John J. Eagan, who had previously worked in connection with the Council's revision of the rules on appeal, B. Abbott Goldberg, who joined the staff on April 1, 1944, following his retirement from the U. S. Army, and Martin J. Katz.

II. Scope of the Survey

Following the appointment of the committee and the selection of the research staff, the Council undertook a general investigation to ascertain the number and kind of administrative agencies in the State Government. A fairly detailed examination of our statute law indicated that there are more than 100 agencies which might possibly come within the Legislature's authorization to the Judicial Council.

By the time this preliminary investigation had been completed, approximately a year and three months were left prior to the meeting of the 1945 Legislature. It was apparent, therefore, that the Council could not hope to include all of the agencies of State Government in the present report. It was thought desirable to select a fairly large group of agencies which were engaged in approximately the same kind of opera-

tions. Various factors were considered in making this selection. For example, many State agencies do not possess the power to regulate or control private activities in any way. Typical of such agencies are the State departments and officers whose duties are limited to the internal functioning of State Government or the agencies which have been created from time to time merely for the purpose of assembling information and making it available to other governmental bodies or to the public generally. Among the State agencies which do have the power to affect private rights, there are many whose activities are primarily legislative in nature. Such agencies generally have the power to adopt rules and regulations under which the public, or some segment of the public, is required to operate. Because of the primarily judicial interest of the Council, it was thought that its most valuable contribution could be made in the field of administrative adjudication rather than in the field of quasi-legislative action. For that reason no attempt has been made in this report to include the agencies which are primarily rule-making in nature.

Even in the field of administrative adjudication, the Council did not have time to make an over-all investigation and recommendation. The adjudicating power of State agencies varies greatly and includes such diverse functions as those involved in the fields of taxation, workmen's compensation, public utilities regulation and the payment of unemployment or social security benefits. It was not possible to cover this extensive field of administrative activity in complete detail, and the Council considered it far more desirable to offer a careful and detailed proposal with respect to a portion of the field of administrative adjudication than to attempt to cover the entire field with a general, less precise statute. It was determined, therefore, to select a portion of the field of administrative adjudication which seemed most in need of improvement. This, the Council concluded, was the one occupied by the agencies engaged in licensing and disciplining the members of the various professions and occupations. The decisions of such agencies have been challenged frequently before the California courts and this group seemed to furnish the largest single category of State agencies.

The Council's survey of administrative procedure has been limited, therefore, to this particular type of administrative adjudication. The proposed legislation is designed to provide a solution for many of the difficulties and injustices arising in the administrative licensing and disciplining of private citizens. The theories underlying the Council's proposals in this limited field are susceptible, of course, of adaptation to other kinds of administrative action; and it is the Council's hope that this adaptation and extension of its work will be undertaken in the future.

III. Legislation Proposed by the Judicial Council

A. Department of Administrative Procedure *

The investigation conducted by the Judicial Council demonstrated that the greatest single defect in the present procedure of State administrative agencies is the lack of uniformity in their proceedings. The Council's survey indicated that an almost unbelievable diversity exists in the statutes under which the State's agencies operate, as well as in the practices of the agencies themselves, even where the administrative

* The proposed legislation is set forth in Appendix A, Part 1.

function involved is identical. The major reason for this diversity, in the Council's judgment, is the fact that no single State department has been charged with the duty of devoting continuous, expert attention to the operation and procedure of the State's administrative agencies. This problem has been noted in other jurisdictions also, and has been met by the recommendation that a department of government be created to devote constant attention to these problems. Thus, the report of the United States Attorney General's Committee on Administrative Procedure and the Benjamin Report in New York recommended the creation of a department of administrative procedure. The Judicial Council has adapted this suggestion for use in California and has suggested a statute converting the existing Department of Professional and Vocational Standards into a Department of Administrative Procedure (See Appendix A, Part 1).

The statute proposed by the Council has two major purposes: (1) to provide for the continued improvement of administrative procedure, and (2) to maintain a staff of qualified hearing officers available to all State agencies. The need for a continuing study of administrative procedure is apparent from the present investigation undertaken by the Council. Many other State agencies and many other kinds of administrative action will require similar analysis and improvement, and there will be a continuing need for such work in the light of the new problems which are constantly arising and the new agencies which are being created. Under the administrative procedure act recommended by the Council, State agencies are required to use qualified hearing officers in their adjudicatory proceedings. Many agencies have neither the volume of business nor the funds to warrant the employment of full-time hearing officers. Moreover, agencies may from time to time require the services of hearing officers in addition to those regularly employed. The Council's proposal contemplates, therefore, that the Department of Administrative Procedure shall maintain a panel of hearing officers available for use by the various State agencies. These officers will also be available to continue the study of means of improving administrative procedure.

In working out this proposal a number of possibilities have been considered. It was recommended both by the United States Attorney General's Committee and by the Benjamin Report that a new department be created. The Judicial Council concluded that no new agency is required, but that these duties should be vested in one of the present agencies of State Government. The duties contemplated under this proposal could, of course, be delegated to one or more existing agencies, such as the Department of Justice, the Legislative Counsel or the Judicial Council. Each has had experience in some phases of the work required, but other phases might be inconsistent or in conflict with its primary duties. The Department of Justice now has the duty of prosecuting cases before many agencies and it would be difficult to achieve a separation of functions between the prosecuting deputies and hearing deputies. Even if separation was achieved in fact, the appearance of unfairness would remain if both prosecuting and hearing functions were vested in the same department. The Legislative Counsel is engaged almost exclusively in problems of legislation, and it would require a far-reaching expansion of his functions and his staff to bring the problems of administrative procedure within his field of responsibility. Similarly, the

proceedings (Sec. 22). An agency is without power to reconsider a decision unless that right is given by statute, and most of the California agencies do not possess the power now.

In order to prevent an overlapping of jurisdiction between the courts and the agencies the power of reconsideration is limited to the period before the agency order becomes effective. As previously explained, this period normally will be 30 days but the agency may shorten it. Any party may petition for reconsideration, or the agency may make an order on its own motion. If reconsideration is granted, the proceedings are similar to those in a case where the agency decides contrary to the hearing officer's proposed decision. It is contemplated that the agencies will consider all petitions for reconsideration, but if the petition is filed too late or for some other reason an agency fails to act, the petition is deemed denied.

After a decision has become effective the agency may want to reduce the penalty or reinstate the respondent. Special statutes of different types now cover these possibilities in connection with a few of the agencies. Most of these specific statutes were designed to meet particular needs and should be retained. It was concluded, however, that a general provision to apply to the other agencies would be desirable (Sec. 23). In order to prevent constant applications for reinstatement or change in penalty, the provision is made that at least a year must elapse between the effective date of the decision and an application or between successive applications. The proposed statute also contains a provision that the Attorney General shall be notified of the filing of an application and may argue the matter. The Attorney General represents the interests of the people of the State and his constant contact with agency cases should enable him to determine whether any public policy militates against the reinstatement of a particular applicant.

C. *Judicial Review of Administrative Action* *

Some solution of the problems involved in the judicial review of administrative action was specifically requested by the Legislature. An analysis of these problems is contained in an appendix to this report (See Appendix B). The legislative measures recommended in this report, it is believed, will do much to clarify the situation. It is true that there are numerous constitutional obstacles to action by the Legislature in this field and, in the past, few statutes have attempted to deal with the judicial review of administrative action. These statutory proposals are limited to the field of administrative adjudication, but they will apply to all quasi-judicial administrative proceedings whether they arise under the proposed administrative procedure act or not. Thus, the proceedings of both local and state-wide agencies can be reviewed by this procedure though the scope of the review may not be the same in each case.

These proposals do not depart from the procedural pattern laid down by recent court decisions, and the proposed statute specifies the details of procedure for judicial review by the writ of mandate. The proposals do not purport to be a complete solution to all the problems of judicial review. Indeed, the steps which have been recommended by some, as for example, the use of a simple statutory proceeding in place of

* The proposed legislation is set forth in Appendix A, Part 3.

the extraordinary writs, do not seem feasible in view of the limited power which the Legislature has to act in this field.

The major proposal consists of an amendment to the sections of the Code of Civil Procedure dealing with the writ of mandate. Without affecting the historic uses of the writ it is suggested that, by the addition of a new section to the statute, the Legislature could prescribe the details of procedure where the writ is used for reviewing the adjudicatory decisions of administrative bodies. One of the strongest arguments in support of such a proposal is contained in the concurring opinion in *Sipper* v. *Urban,* in which Justice Schauer says:

> "As to the legislative constitutional problem previously mentioned, [the Constitution] . . . does not preclude it from setting up a form or forms of procedure in the nature of the mandamus review which has been developed. So long as it does not add to or subtract from the courts' constitutional powers, express or inherent, it may prescribe regulations which would constitute a guide for the public, the administrative officers, and the courts. It should not be necessary for this court to have to improvise rules of procedure for review of the decisions of any of the several boards of the State, as is trenched upon in the Dare case, yet the need for such rules is patent. It seems highly probable that many of the seemingly arbitrary practices of such agencies and many of the claims of injustice to individuals would be obviated if there were legislatively established standards and plans of procedure governing both the initial proceedings and the review thereof, known alike to the courts and boards and known by or available to the public. Not the least of the beneficiaries of such legislation would be the boards and officers themselves, most of whom are striving diligently and conscientiously to serve the public despite the uncertainties of the procedures which they have attempted to follow and to which they have been subjected." [22 Cal. 2d 138, 151, 137 P. 2d 425, 431 (1943).]

The suggested amendment to the Code of Civil Procedure would be numbered Section 1094.5 and it is set forth in Part 3 of Appendix A in this report. The proposal is limited to cases involving administrative adjudication, and provides that the case shall be heard by a judge without a jury. The record of the administrative proceeding is made available to the court and the expense of preparing the record is recoverable as costs by the successful party. The questions which are to be considered by the court upon such review are specified at length and are modeled upon the statutory provisions suggested by other studies as well as upon the case law of this State. They include the questions: whether the board has exceeded its jurisdiction; whether there was a fair trial; whether the board proceeded in the manner which the law requires; whether its order or decision is supported by the findings and the evidence adduced at the hearing. Where a challenge is made to the adequacy of the evidence to support the determination a dual provision is made. Provision is made for the cases in which the court has the power to exercise an independent judgment on the evidence and also for the cases in which the court merely examines the record to ascertain whether the decision is supported by substantial evidence.

This proposed amendment to the Code of Civil Procedure authorizes the court to remand a case for further consideration by the agency in the light of new evidence or, in cases in which the court can exercise an independent judgment on the evidence, it authorizes the taking of the new evidence in court. The judgment entered by the court may order that the administrative decision be set aside or the court may affirm the administrative action by refusing to issue the writ. In setting the case aside the court may order that it be reconsidered by the board in the light of the court's judgment, but provision is made that the court should not attempt to control the discretion which is legally vested in the agency in ordering such reconsideration. Finally it is proposed that, pending the determination of the proceedings for judicial review, a stay of the administrative order may be granted by the court in which the action is pending. The statute provides, however, that no such stay shall be imposed or continued where it is against the public interest. This last provision is intended to cover cases in which the court is satisfied that, because of the particular factual situation, the administrative order should be continued in effect pending the outcome of the proceeding for judicial review.

In addition to the general amendment to the Code of Civil Procedure, the proposed administrative procedure act includes a section designed to cover the particular proceedings to which that act applies (Sec. 24). Review of such proceedings is to be had by the writ of mandate and the petition is required to be filed within 30 days after the agency's power to reconsider its decision expires. Thus, the agency's decision will be a final one and the administrative process will be complete. The statute provides, however, that the right to judicial review is not lost by a failure to petition for reconsideration. The Council decided that the established policy requiring the exhaustion of administrative remedies is adequately safeguarded by the requirement that the administrative proceeding must be completed before the right to judicial review exists. The proposed section of the administrative procedure act specifies what a complete record of the administrative proceeding consists of, but permits the petitioner to designate whatever portion of the record he chooses to submit to the court. The agency can submit the rest of the record or the court can order that it be submitted under the proposed Sec. 1094.5 of the Code of Civil Procedure. A provision is made for an extension of the time for filing the petition for mandate where the agency delays in preparing the record after it has been requested by the petitioner. The agency is also permitted to file the original of any document in lieu of a copy thereof.

The proposals in the field of judicial review are in substantially the form in which they were submitted publicly in a tentative draft. They have received general approval from the agencies and from members of the bar and the Council believes that the enactment of these recommended statutes will produce a substantial improvement in our present procedure for the judicial review of administrative orders and decisions.

IV. Conclusion

There are many problems in California administrative procedure untouched by the Judicial Council's survey or by its recommendations to the Legislature. Some of these problems may be more important or

more complex than those which have already been examined. The recommendation that a Department of Administrative Procedure be established in the State Government is intended to provide a means for their ultimate solution but it might be useful to outline briefly the extent of the work which remains to be done.

First, there are the fields of administrative action in which no investigation has been made by the Council. It has already been pointed out that no attempt was made to cover the quasi-legislative activities of State agencies. Fair procedure requires adequate publicity for administrative regulations and an opportunity for those who are affected to challenge their validity. The Legislature has already provided for the publication of administrative rules and regulations in this State but the procedure by which they are adopted and the procedure for challenging them before the agency or the courts deserve careful study. Many types of administrative adjudication were not covered by the Council's work, either because the function involved was not comparable to the disciplinary proceedings of licensing boards or because of the organization of the particular board. Thus, no attempt was made to cover preliminary investigatory proceedings, routine examination procedure, informal adjudications, or the formal adjudications of such agencies as the Industrial Accident Commission, the Railroad Commission, the State Personnel Board, the California Employment Stabilization Commission and many others. The omission of these problems and these agencies from the Council's survey was a limitation imposed by practical considerations and did not result from the conclusion that no improvement was needed.

Second, there are many problems which are not strictly procedural in nature. In the course of the Council's survey it was discovered that many statutes prescribe very indefinite or inadequate grounds for administrative action. Thus, the statute under which the State Board of Accountancy operates provides merely that a certificate may be revoked "for cause." There is doubt as to the validity of such a provision and a natural reluctance on the part of the agency to exercise its powers, with a consequent loss of protection to the public. Similarly, the power vested in the State's agencies does not follow any standard form, some having only the power to revoke without the power of suspension, probation or reprimand given to other agencies exercising the same kind of function. One such power is the power to suspend a licensee temporarily pending the determination of his case by the agency. Many State agencies urged that such a provision be incorporated in the Council's recommendations to the Legislature upon the ground that no power exists in many agencies at present to put a particular licensee out of operation in an aggravated case soon enough to protect the public interest. This power involves far more than a problem of administrative procedure and it was concluded that, while the Council's recommendations would preserve any existing power of temporary suspension, any agency desiring such powers should secure them by specific legislation.

Finally, work remains to be done upon certain problems within the Judicial Council's particular field of responsibility. The use of the extraordinary writ of mandate as the means for judicial review of administrative adjudication in California inevitably raises the question of the adequacy of our present procedure in this field. The Council included in its tentative draft a proposed constitutional amendment authorizing

the Legislature to create a single form of special proceeding by which the extraordinary writs of mandamus, certiorari and prohibition could be obtained. This was intended as a procedural change only, for the purpose of adapting the code concept of a single form of action to the field of the extraordinary writs. The Judicial Council concluded, however, that it should not be proposed at the present time and as part of the present report. Such a proposal affects the use of the extraordinary writs in many fields other than that of administrative procedure, and the present study does not constitute a sufficiently comprehensive background upon which to rest the proposal. In addition, there is the possibility that legislation drafted after further study, without a constitutional amendment, might accomplish most if not all of the necessary reforms in our writ procedure.

JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE AGENCIES SURVEY
APPENDIX A. PROPOSED LEGISLATION

PART 1. Act Creating a Department of Administrative Procedure

This proposed act would convert the present Department of Professional and Vocational Standards into a Department of Administrative Procedure. The new department would carry on all the functions of the present department and, in addition, would be charged with the duty of maintaining a staff of hearing officers for the use of State agencies and with the duty of continuing the improvement of administrative procedure in California.

An act to amend Sections 23, 23.5, 100, 102, 150, 158, 203, 204, 400, 401, 402, 403, 404, 1601, 2100, 2701, 3010, 3146, 3148, 3151, 4000, 4063, 4070, 4800, 5000, 5510, 6500, 6702, 6710, 6721, 7000, 7301, 7501, 7503, 7601, 7608, 8501, 8702, 8910, 16501, 19004, 19030, 19031 of, and to add Sections 110.5 and 110.6 to the Business and Professions Code, relating to the employment of hearing officers and the continued study of administrative procedure.

The people of the State of California do enact as follows:

SECTION 1. Section 23 of the Business and Professions Code is amended to read as follows:

23. "Department," unless otherwise defined, refers to the Department of Administrative Procedure.

SEC. 2. Section 23.5 of the Business and Professions Code is amended to read as follows:

23.5. "Director," unless otherwise defined, refers to the Director of Administrative Procedure.

SEC. 3. Section 100 of the Business and Professions Code is amended to read as follows:

100. There is in the State Government a Department of Administrative Procedure.

SEC. 4. Section 102 of the Business and Professions Code is amended to read as follows:

102. Upon the request of any board regulating, licensing or controlling any professional or vocational occupation created by an initiative act, the Director of Administrative Procedure may take over the duties of the board under the same conditions and in the same manner as provided in this code for other boards of like character. Such boards shall pay a proportionate cost of the administration of the department on the same basis as is charged other boards included within the department.

APPENDIX A. PROPOSED LEGISLATION

PART 3. Act Providing Procedure for Judicial Review by Mandamus

This proposed amendment to the Code of Civil Procedure sets forth the procedure by which judicial review can be had by the writ of mandate after a formal adjudicatory decision by any administrative agency. It would apply specifically to cases arising under the Administrative Procedure Act (Part 2 of this appendix), but would also apply to the quasi-judicial proceedings of local administrative agencies.

An act to add Section 1094.5 to the Code of Civil Procedure, relating to the judicial review of administrative decisions.

The people of the State of California do enact as follows:

SECTION 1. Section 1094.5 is added to the Code of Civil Procedure, to read:

1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken.

APPENDIX B. SUMMARY OF STATUTES, CASE LAW AND COMPARATIVE STUDIES

Introduction

PART 3. AMENDMENT TO THE CODE OF CIVIL PROCEDURE

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

1. California Statutes and Practice, and

2. California Cases

The California Constitution imposes definite limitations with respect to the procedures which are available for the judicial review of administrative action, and therefore most statutes are noncommital on the subject. Many statutes are silent (Chiropractic, Dental, Medical, Nurse, Optometry, Pharmacy). Some provide that an administrative decision is "subject to review" (Contractors, Pest Control), "subject to examination in the courts" (Architectural), "subject to such review as is permitted or authorized by law" (Insurance), or is subject to "judicial review in accordance with law." (Real Estate, Veterinary, Yacht). Statutes have provided that review may be had by commencing "an action to compel approval" (Osteopathic) or by a "proceeding in a court of competent jurisdiction" which "is governed by the Code of Civil Procedure" (Cosmetology). In certain cases the Legislature has attempted to designate the procedure to be used by specifying the writs of review, mandate or prohibition (Corporations), and in one case a statute has provided that the decision of a board as to examinations shall not be "subject to review by any court or other authority" (Nurse).

Generally speaking, writs of mandate and equity actions are used most frequently to secure judicial review of administrative action. Actions for declaratory relief and writs of review are also used, as are specific proceedings designated by the Legislature in particular cases. The power of the courts to determine any justiciable issue properly brought before them often furnishes the basis for judicial review in situations where there is no statutory provision as to the judicial review of administrative action [1] or where the procedure designated by the Legislature can not be used constitutionally.[2]

General limitations imposed by the courts require that proceedings for reviewing administrative action be brought within a reasonable time (where none is specified by statute).[3] Similarly the courts have imposed a general limitation upon the right to judicial review which requires

[1] Bodingson Mfg. Co. v. Calif. Employ. Comm., 17 Cal. 2d 321, 109 P. 2d 935 (1941).

[2] Sipper v. Urban, 22 Cal. 2d 138, 137 P. 2d 425 (1943); Hogg v. Real Estate Commissioner, 54 Cal. App. 2d 712, 129 P. 2d 709 (1942).

[3] Orwitz v. Board of Dental Examiners, 55 Cal. App. 2d 888, 132 P. 2d 272 (1942); Campbell v. City of Los Angeles, 47 Cal. App. 2d 310, 117 P. 2d 901 (1941); Pacheco v. Clark, 44 Cal. App. 2d 147, 112 P. 2d 67 (1941); see Brown v. State Personnel Board, 43 Cal. App. 2d 70, 110 P. 2d 497 (1941).

that any administrative remedy provided must be exhausted as a prerequisite to such review.[4]

Actions at law. The action at law for damages has been regarded as one of the well-established means for reviewing administrative action.[5]

There has been very little use made of this procedure in California as a means for reviewing or checking administrative action because of the limited issues which may be presented. The action will not lie where the administrative officer or agency has acted within the limits of discretionary power, whether that discretion be legislative or judicial in nature.[6] The issues which can be presented where discretionary action is involved are limited to excess of jurisdiction on the part of the administrative officer or agency or abuse of discretion,[7] and if the excess of jurisdiction results from the unconstitutionality of the statute under which the officer has acted, immunity from liability exists for him under the provisions of Government Code, Sec. 1955.[8] Negligence in the performance of ministerial duties imposes civil liability upon administrative officers, but in the field which is being considered here discretion is nearly always involved in the acts of the administrative officer or agency. For these reasons, the civil action for damages can not be considered as an effective means for reviewing quasi-legislative action by administrative agencies in California, and there is no indication that it has been used to any great extent in actual practice.

The principles which have been discussed concerning use of the civil action for damages as a means of reviewing quasi-legislative acts of administrative agencies in California apply generally to its use where quasi-judicial administrative acts are involved. Thus, where discre-

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[4] This requirement has been applied to various proceedings for securing judicial review: mandate—Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P. 2d 942 (1941); injunction—Metcalf v. County of Los Angeles, 24 Cal. 2d 267 148 P. 2d 645 (1944); declaratory judgment—Imp. Mut. Life Ins. Co. v. Caminetti, 59 Cal. App. 2d 501, 139 P. 2d 691 (1943); action to compel obedience of an administrative subpena—Hill v. Brisbane, 66 Cal. App. 2d __ (66 A. C. A. 15), 151 P. 2d 578 (1944); trial de novo—Collier & Wallis v. Astor, 9 Cal. 2d 202, 70 P. 2d 171 (1937).

The requirement of exhaustion of administrative remedies has been applied both to the situation in which the administrative action is incomplete (Abelleira v. District Court of Appeal, *supra;* Matcovich v. Calif. Employment Com., 64 Cal. App. 2d 40, 148 P. 2d 118 (1944)), and to the situation in which there was a failure to take some permissive procedural step although the administrative action became final. (Alexander v. State Personnel Board, 22 Cal. 2d 198, 137 P. 2d 433 (1943).) The latter case applied the requirement even though the administrative remedy (a rehearing) was permissive, not mandatory. A later case refused to apply this rule to a permissive rehearing provided by a municipal charter upon the ground that a rehearing can not be held to be a jurisdictional prerequisite to judicial review where an administrative refusal to act, rather than adverse administrative action is involved. (Ware v. Retirement Board, 65 Cal. App. 2d __ (65 A. C. A. 1064), 151 P. 2d 549 (1944).) The doctrine does not bar judicial action, however, where the Legislature has provided alternative methods for testing the validity of administrative action. (Scripps, etc. Hospital v. Cal. Emp. Com., 24 Cal. 2d 669, 151 P. 2d 109 (1944).)

It has been said that the exhaustion of administrative remedies is required even though the administrative action is challenged on jurisdictional or constitutional grounds. (U. S. A., Growers A. Com. v. Superior Court, 19 Cal. 2d 189, 120 P. 2d 26 (1941); but see Van Gammeren v. City of Fresno, 51 Cal. App. 2d 235, 124 P. 2d 621 (1942).)

[5] Atty. Gen. Rep., p. 81.

[6] David, "Tort Liability of Public Officers" (1939) 12 S. C. L. Rev. 127, 149, 260; 21 Cal. Jur. 908, et seq.

[7] David, *supra*, note 6; 43 Am. Jur. 86, et seq.; (1933) 85 A. L. R. 298.

[8] Formerly Civil Code, sec. 3342; see David, *supra*, note 6, at 148.

tionary administrative power of a quasi-judicial nature is involved, the review by such an action is limited to acts in excess of jurisdiction and acts which constitute an abuse of discretion.[9] The action for damages has not furnished a practicable means, therefore, for reviewing the quasi-judicial actions of administrative officers and it has not been used in California.

Equity injunction and declaratory judgment. The inadequacy of the action at law as a means for reviewing administrative action led to the use of the suit in equity, and this procedure has been characterized as the common remedy in the United States for relief against administrative action.[10] The right to obtain relief in equity against administrative action depends, as in other cases, upon the inadequacy of other remedies and the establishment of irreparable injury.[11] In addition, the availability of the remedy is affected by the provisions of section 526 of the Code of Civil Procedure, and section 3423 of the Civil Code, both of which provide:

> "An injunction can not be granted: * * * (4) To prevent the execution of a public statute by officers of the law for the public benefit. * * * (6) To prevent the exercise of a public or private office, in a lawful manner, by the person in possession; (7) To prevent a legislative act by a municipal corporation."

These limitations upon the power of equity courts to grant injunctions in certain cases have been sustained by the courts, either as legislative restatements of familiar principles of equity or as limitations which affect the rights of the individuals rather than the power of the courts.[12] These statutory limitations upon the power of equity courts have been held not to apply in California when the legislation involved is invalid, upon the theory that the statutory protection against injunctive action was intended to apply only in favor of valid legislative action, and this exception applies to both ordinances and statutes which are unconstitutional.[13] Thus, where a challenge is made to the constitutionality of the statute or ordinance under which the administrative agency is acting, or where it is claimed that the statute or ordinance (though constitutional generally) is unconstitutional as applied by the administrative agency, the remedy of an equity injunction is available on behalf of the aggrieved party.[14] It has also been held that the remedy of an equity injunction is available to an aggrieved party, even though a constitutional statute is

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[9] Ballerino v. Mason, 83 Cal. 447, 23 P. 530 (1890); Downer v. Lent, 6 Cal. 94 (1856); Jones v. Richardson, 9 Cal. App. 2d 657, 50 P. 2d 810 (1935); see David, *supra*, note 6, at 260, 279.

[10] Atty. Gen. Rep., p. 81; 42 Am. Jur. 607; cf. 14 Cal. Jur. 200-205.

[11] Metcalf v. County of Los Angeles, 24 Cal. 2d 267, 148 P. 2d 645 (1944); Donato v. Board of Barber Examiners, 56 Cal. App. 2d 916, 133 P. 2d 490 (1943).

[12] Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 154 P. 845 (1916).

[13] Wheeler v. Herbert, 152 Cal. 224, 92 P. 358, (1907); Bueneman v. City of Santa Barbara, 8 Cal. 2d 405, 65 P. 2d 884 (1937). Cf. Reclamation District No. 1500 v. Superior Court, *supra*, note 12, in which the court points out that in some states these statutory limitations upon the power of equity are held to apply even though the statute is unconstitutional.

[14] Calif. Drive-In Restaurant Assn. v. Clark, 22 Cal. 2d 287, 140 P. 2d 657 (1943); Ray v. Parker, 15 Cal. 2d 275, 101 P. 2d 665 (1940).

involved, if the administrative order issued under the statute is in fact invalid.[15] It follows therefore, that in such a proceeding for an equity injunction against quasi-legislative action the scope of the court's investigation extends to the question of the validity of the statute or ordinance and also to the question of the validity of the administrative action taken under the statute.

The foregoing discussion deals with the availability of an equity injunction apart from any special statutory provisions. Occasionally, however, the Legislature has provided specifically that injunctive relief shall be available to review certain types of administrative action. In such cases, the normal prerequisites to obtaining injunctive relief would not have to be established and presumably the scope of review would extend to any issues concerning the validity of the administrative action.[16]

Equity injunctions have been used as a means of reviewing quasi-judicial action in California, subject to the requirements of irreparable injury, inadequacy of other remedy, and to the statutory limitations mentioned under the review of quasi-legislative action where the enforcement of a public statute is involved. Cases have held that the remedy of an equity injunction is not available where other remedies are adequate.[17] The courts have held that the provisions of Civ. Code, Sec. 3423, and Code Civ. Proc., Sec. 526 prohibit the issuance of an injunction to restrain the enforcement of a valid statute.[18] In California these statutes do not prevent the issuance of an injunction where the statute is unconstitutional or where, though constitutional, the administrative agency or officer proposes to apply it in an unconstitutional manner. These issues can be raised by bringing an equity action.[19] In the judicial review of quasi-judicial action, however, the equity injunction has apparently not been used as a means of investigating whether the administrative agency or officer is acting within the authority granted by a valid statute, unless

[15] Challenge Cream etc. Assn. v. Parker, 23 Cal. 2d 137, 142 P. 2d 737 (1943); Brock v. Superior Court, 11 Cal. 2d 682, 81 P. 2d 931 (1938); Agricultural Prorate Commission v. Superior Court, 5 Cal. 2d 550, 55 P. 2d 495 (1936); Agricultural Prorate Commission v. Superior Court, 31 Cal. App. 2d 518, 88 P. 2d 253 (1939). This use of an equity injunction where a valid statute is involved, but where the court concludes that the administrative officer or agency has gone beyond the scope of the statute, seems very recent in California. The cases give no explanation for the use of injunction where a constitutional statute is involved.

[16] Such a provision exists with respect to the power of the Commissioner of Corporations to make orders requiring the discontinuance of "unsafe or injurious" practices by industrial loan companies. Deering's Gen. Laws, 1944, Act 3603. Sec. 11, provides: "Such company shall have 10 days after any such order is made final in which suit may be commenced to restrain enforcement of such order. * * *"

[17] Moore v. Superior Court, 6 Cal. 2d 421, 57 P. 2d 1314 (1936) [mandamus available]; Vincent Petroleum Corp. v. Culver City, 43 Cal. App. 2d 511, 111 P. 2d 433 (1941) [mandamus or certiorari available]; Saxon v. State Board of Education, 137 Cal. App. 167, 29 P. 2d 873 (1934) [certiorari available].

[18] Skinner v. Coy, 13 Cal. 2d 407, 90 P. 2d 296 (1939); Loftis v. Superior Court, 25 Cal. App. 2d 346, 77 P. 2d 491 (1938); Daugherty v. Superior Court, 23 Cal. App. 2d 739, 74 P. 2d 549 (1937); State Board of Equalization v. Superior Court, 5 Cal. App. 2d 374, 42 P. 2d 1076 (1935).

[19] Skinner v. Coy, *supra*, note 18; Brock v. Superior Court, 12 Cal. 2d 605, 86 P. 2d 805 (1939); People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3 (1930); Universal Cons. Oil Co. v. Byram, 25 Cal. 2d ____ (25 A.C. 349), ____ P. 2d ____ (1944).

the action would result in an unconstitutional application of the statute.[20] In this respect a differentiation is to be made between the use of the equity injunction for reviewing quasi-legislative action, and its use in reviewing quasi-judicial action of administrative boards and agencies. Similarly, no specific statutes have been found authorizing the use of injunctive procedure where quasi-judicial administrative acts are involved.

In addition to the equity injunction, actions for declaratory relief are frequently brought to challenge the validity of administrative rulings which are quasi-legislative in nature.[21] The conditions under which relief is available are specified by statute [22] and where a proper case is brought the procedure results in a declaration of the validity or invalidity of the administrative regulation. There is no indication that such relief would be available where quasi-judicial action is involved, and in any case the court has discretion as to whether or not the remedy is necessary or proper at the time and under all the circumstances of the case.[23]

Writ of review and writ of prohibition. The common law writ of certiorari is called the writ of review in California.[24] The power to issue this writ and the writ of prohibition is given by the Constitution to the Supreme Court, the District Courts of Appeal and to the Superior Courts.[25] The writ of review is provided for by statute and lies where an inferior tribunal exercising judicial functions has exceeded its jurisdiction and there is no appeal or other adequate remedy.[26] The writ of prohibition is also covered by statute and it is available to arrest the proceedings of any tribunal exercising judicial functions where the proceedings are in excess of its jurisdiction and there is no adequate remedy otherwise.[27] Both writs are treated together in this discussion because the principles governing their use are virtually the same.

One problem discussed with reference to other actions to review administrative proceedings can be eliminated quickly. These writs are available only for the purpose of reviewing action which is judicial in nature, and thus it follows that any action of a legislative nature can not be challenged in the courts by either writ.[28]

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[20] In a number of cases the court has not gone beyond the determination that a valid statute is involved; see State Board of Equalization v. Superior Court, *supra*, note 18; Loftis v. Superior Court, *supra*, note 18; Daugherty v. Superior Court, *supra*, note 18. Cf. Brock v. Superior Court, *supra*, note 10, in which the court indicated that it would investigate whether the statute was being applied in an unconstitutional manner.

[21] Calif. Drive-In Assn. v. Clark, 22 Cal. 2d 287, 140 P. 2d 657 (1943); Viner v. Civil Service Comm. of San Francisco, 59 Cal. App. 2d 458, 139 P. 2d 88 (1943); cf. Louis Eckert Brewing Co. v. Unemployment Res. Comm., 47 Cal. App. 2d 844, 119 P. 2d 227 (1941).

[22] Code Civ. Proc., Secs. 1060-1062a, provide that any person interested under a "written instrument" can secure a declaration of his rights and duties, including the determination of any question of construction or validity arising under such instrument. This language has been construed by the courts to extend to the question of the construction and validity of administrative rules and regulations.

[23] Code Civ. Proc., Sec. 1061.

[24] Code Civ. Proc., Sec. 1067.

[25] Const., Art. VI, Secs. 4, 4b, 5.

[26] Code Civ. Proc., Secs. 1067-1077.

[27] Code Civ. Proc., Secs. 1102-1105.

[28] The statutes require that "judicial functions" be involved. See Code Civ. Proc., Secs. 1068, 1102.

For many years both these writs were generally available in California for the purpose of challenging administrative adjudication.[29] In recent years, however, limitations have been put upon the use of both of these writs by judicial decision.[30] Their use is now restricted to situations where the action involved can be said to be strictly judicial in nature, and the result is that neither writ is available where the action of an administrative agency of state-wide jurisdiction is involved.[31] A limited field remains, therefore, in which the writs of review and prohibition are available for the purpose of challenging administrative action. In this field the major groups are: the quasi-judicial acts of local administrative agencies[32] and the acts of certain State officers or bodies which are characterized as judicial in nature.[33]

Where available, the scope of the judicial investigation on a writ of review or a writ of prohibition is limited to so-called jurisdictional questions.[34] The jurisdictional test which applies here, however, is not identical with the concept of jurisdiction used in connection with such problems as are involved in a collateral attack upon a judgment. Where the writs of review and prohibition are involved, a broader concept of jurisdiction is utilized by the courts. Relief is available where the action of the tribunal exceeds its delegated powers, as those powers are defined by provisions of constitution or statute.[35] Thus, errors, are

[29] Writ of review: State Board of Chiropractic Examiners v. Superior Court, 201 Cal. 108, 255 P. 749 (1927); Suckow v. Alderson, 182 Cal. 247, 187 P. 965 (1920). Writ of prohibition: Chapman v. Stoneman, 63 Cal. 490 (1883); Hevren v. Reed, 126 Cal. 219, 58 P. 536 (1899). See also Rode, "Administrative Adjudication in California and its Review by the Writ of Certiorari" (1937) 25 Calif. L. Rev. 694.

[30] Standard Oil Co. v. State Board of Equalization, 6 Cal. 2d 557, 59 P. 2d 119 (1936). As to the writ of prohibition see Whitten v. California State Board of Optometry, 8 Cal. 2d 444, 65 P. 2d 1296 (1937). See, in this connection, Turrentine, "Restore Certiorari to Review State-Wide Administrative Bodies in California" (1941) 29 Calif. L. Rev. 275.

[31] See the concurring opinion in Sipper v. Urban, 22 Cal. 2d 138, 137 P. 2d 425 (1943); Laisne v. California State Board of Optometry, 19 Cal. 2d 831, 123 P. 2d 457 (1942); Drummey v. State Board of Funeral Directors, 13 Cal. 2d 75, 87 P. 2d 848 (1939). Earlier decisions had held that these writs were unavailable where the administrative action involved in the particular case did not involve judicial functions, but no general restriction on the use of the writ with State-wide administrative agencies existed. See Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874 (1921); Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076 (1925).

[32] Walker v. City of San Gabriel, 20 Cal. 2d 879, 129 P. 2d 349 (1942); Swars v. Council of the City of Vallejo, 64 Cal. App. 2d 858, 149 P. 2d 397 (1944). The continued use of these writs with local administrative agencies is predicated upon the Legislature's power to create "inferior courts" in any city or county. See Laisne v. California State Board of Optometry, *supra*, note 31. Also, Elliott, "Certiorari and the Local Board" (1941) 29 Calif. L. Rev. 586.

[33] See O'Brien v. Olson, 42 Cal. App. 2d 8, 109 P. 2d 8 (1941), in which the Governor was held to have exercised judicial functions for the purpose of the writ of review.

[34] Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P. 324 (1927); Garvin v. Chambers, 159 Cal. 212, 232 P. 696 (1924). (Cases are cited as to the scope of the writs of review and prohibition regardless of when they arose, on the theory that the recent judicial limitation on the availability of the writ in no way altered the nature of the relief given when the writ is available.)

[35] Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P. 2d 942 (1941); Redlands High, etc. District v. Superior Court, 20 Cal. 2d 348, 125 P. 2d 467 (1942).

correctible by the writs of review and prohibition where they are outside the limits of the agency's delegated powers, as for example, an error of law resulting in action outside the agency's jurisdiction[36] or a finding made in the absence of any competent evidence to support it.[37] Conversely, errors not amounting to excess of jurisdiction can not be reached by these writs [38] and no right exists to introduce evidence outside of the record made before the agency in order to contradict the record.[39]

The writ of mandate. Jurisdiction to issue the writ of mandate is vested in the Supreme Court, the District Courts of Appeal and the Superior Courts.[40] The details of procedure are regulated by statute and the writ is available where there is no other adequate remedy to compel the performance of an act which the law specially enjoins or to compel the admission of a party to a right or office to which he is entitled and from which he is unlawfully excluded.[41] Provision is made for a jury trial upon essential questions of fact in the discretion of the court issuing the writ.[42]

Until recent years the writ of mandate was not widely used in this State as a means of challenging administrative action for it was limited to situations in which a ministerial officer had refused to perform duties specifically required of him by law.[43] Where discretion, either quasi-legislative or quasi-judicial in nature, had been vested in the administrative officer, the writ could not be used as a means of controlling the exercise of that discretion.[44] Coincidental with the restrictions which were placed by the courts upon the use of the writs of review and prohibition, however, the use of the writ of mandate for the purpose of reviewing administrative action was greatly expanded in California.[45] The nature and precise limits of this expanded use of the writ are not clear. This is a new remedy provided by judicial decision, and the courts have

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[36] Jameson v. State Board of Dental Examiners, 118 Cal. App. 105, 5 P. 2d 47 (1931).

[37] Garvin v. Chambers, 159 Cal. 212, 232 P. 696 (1924); Renwick v. Phillips, 204 Cal. 349, 268 P. 368 (1928); Osborne v. Baughman, 85 Cal. App. 224, 259 P. 70 (1927).

[38] Homan v. Board of Dental Examiners, *supra*, note 34, (defective pleading); Fuller v. Board of Medical Examiners, 14 Cal. App. 2d 784, 59 P. 2d 171 (1936) (weight of the evidence); Winning v. Board of Dental Examiners, 114 Cal. App. 658, 300 P. 866 (1931) (bias of agency member); Pacific Home Building Realty Co. v. Daugherty, 75 Cal. App. 623, 243 P. 473 (1925) (error of commissioner not amounting to excess of jurisdiction); nor has the court any power to modify the penalty imposed; Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P. 2d 67 (1932); Fuller v. Board of Medical Examiners, *supra*.

[39] Thus, where the record showed the presence of a quorum, it would not be proper on a writ of review to receive evidence upon the issue of whether a quorum had in fact been present. See Jordan v. Alderson, 48 Cal. App. 547, 192 P. 170 (1920); Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625 (1918).

[40] Constitution, Art. VI, Secs. 4, 4b, 5.

[41] Code Civ. Proc., Secs. 1084-1097.

[42] Code Civ. Proc., Sec. 1090.

[43] Bodinson Mfg. Co. v. Calif. Employment Commission, 17 Cal. 2d 321, 109 P. 2d 935 (1941).

[44] Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784 (1927); Inglin v. Hoppin, 156 Cal. 483, 105 P. 582 (1909).

[45] Drummey v. State Board of Funeral Directors, 13 Cal. 2d 75, 87 P. 2d 848 (1939); Bodinson Mfg. Co. v. Calif. Employment Commission, *supra*, note 43.

had a relatively short time within which to define the new use for the writ.[46]

Relying upon the cases decided since 1939, certain conclusions can be reached concerning the availability of the writ of mandate as a procedure for reviewing administrative action in California. The courts have given no indication that the new mandate procedure is available where quasi-legislative administrative action is involved.[47] The writ is available, however, to correct abuse of discretion on the part of an administrative agency where the action involved is quasi-judicial in nature.[48] This is true whether the power is the limited quasi-judicial power of state-wide administrative agencies,[49] or the normal quasi-judicial power of local administrative agencies.[50] The remedy is not available as of right, however, and the court to which application is made has a discretionary power to grant or deny the writ.[51]

The scope of review where administrative action is challenged by the writ of mandate may be stated generally to consist of the correction of abuse of discretion.[52] This traditional definition of the purpose of the writ has been carried into the more recent cases, but it does not furnish an

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[46] The first case in this line is Drummey v. State Board of Funeral Directors, *supra*, note 45, decided in 1939. It should be noted, also, that a sharp split has existed on the Supreme Court of California since 1941. Three of the court's seven members deny that the writ of mandate is an appropriate remedy for this purpose, and the decisions outlining the conditions for its use are consequently 4-3 decisions.

On this problem see: Bianchi, "The Case Against S. C. A. Number 8" (1942) 17 Calif. State Bar J. 172; Browne, "Proposition 16 should be Defeated" (1942), 17 Calif. State Bar J. 184; McGovney, "Administrative Decisions and Court Review Thereof, in California" (1941) 29 Calif. L. Rev. 110; Turrentine, "The Laisne Case—A Strange Chapter in our State Jurisprudence" (1942) 17 Calif. State Bar J. 165.

[47] Where quasi-legislative rule-making is involved, the court limits its inquiry to the question whether there was any reasonable basis for the administrative conclusion. (Rible v. Hughes, 24 Cal. 2d 437, 150 P. 2d 455 (1944); Allen v. Bowron, 64 Cal. App. 2d 311, 148 P. 2d 673 (1944).)

[48] The use of the term "quasi-judicial power" in this connection requires some explanation. Throughout this discussion of the methods for judicial review, the term "quasi-judicial" has been used in its ordinary connotation, that is, denoting the exercise of adjudicating functions by administrative agencies. The test applied is an analytical one, and if the administrative action results in a decision concerning private rights based upon evidence taken at a hearing, the action is termed quasi-judicial.

One of the normal attributes of quasi-judicial administrative power is finality of determinations of fact where there is substantial evidence to support such a determination. Local administrative agencies in California still possess this power, but under the California Constitution state-wide agencies can not be given such power. (Laisne v. Calif. State Board of Optometry, 19 Cal. 2d 831, 123 P. 2d 457 (1942).) In this discussion it has been decided to apply the term "quasi-judicial" to the exercise of adjudicating functions by either type of agency, but to indicate the limitation on the power of state-wide agencies by calling the adjudicating powers which they exercise a "limited quasi-judicial power."

[49] Sipper v. Urban, 22 Cal. 2d 138, 137 P. 2d 425 (1943).

[50] Walker v. City of San Gabriel, 20 Cal. 2d 879, 129 P. 2d 349 (1942), in which the petitioner sought a writ of review. The trial court, however, issued a writ of mandate and this procedure was sustained on the theory that both writs were available where the quasi-judicial action of local administrative agencies was involved. In this situation the scope of review is the certiorari scope of review, regardless of which writ is used. (Walker v. City of San Gabriel, *supra*; Ware v. Retirement Board, 65 Cal. App. 2d 781, 151 P. 2d 549 (1944); Shewbridge v. Police Commission, 64 Cal. App. 2d 787, 149 P. 2d 429 (1944).)

Because of the overlapping use of the writs here, the practice has grown of requesting the issuance of both writs. (Shewbridge v. Police Comm., *supra*.)

[51] Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 136 P. 2d 304 (1943).

[52] Sipper v. Urban, *supra*, note 49.

adequate standard for determining when courts will interfere with administrative action until it is annotated by reference to the court decisions. If an error of law is involved, for example, where an agency is acting beyond the powers delegated to it or where it is not complying with the requirements of the statute under which it operates, judicial review by writ of mandate will invalidate the administrative action.[53] Where the fact-finding power is involved, the review by mandate will correct an "abuse of discretion on the facts."[54] If the normal quasi-judicial power of a local administrative agency is challenged, this abuse of discretion on the facts exists only if the finding is not supported by substantial evidence, and where the evidence is conflicting the administrative determination will be sustained.[55] If the limited quasi-judicial power of a state-wide agency is involved, however, the courts on a review by mandate are authorized to exercise an independent judgment on the facts and to make their own findings.[56] In exercising this judgment the courts must give effect to a presumption in favor of the agency's action although the exact effect of this presumption is impossible to estimate.[57] In exercising its independent judgment, the court is authorized, under certain conditions, to accept evidence in addition to that which was presented before the agency [58] and it has been held in at least one case that no prejudicial error resulted where the court refused to consider the transcript of oral evidence taken before the agency and reached its independent conclusion upon evidence taken before the court.[59] The extent of the court's power to take evidence in addition to that presented before the agency has varied from case to case in recent years,[60] and some differences still exist as indicated by recent District Court of Appeal

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[53] Olive Proration Program, etc. v. Agricultural Prorate Commission, 17 Cal. 2d 204, 109 P. 2d 918 (1941); Bodinson Mfg. Co. v. Calif. Employment Commission, 17 Cal. 2d 321, 109 P. 2d 935 (1941); Collins v. Caminetti 24 Cal. 2d 766, 151 P. 2d 105 (1944).

[54] See concurring opinion by Schauer, J. in Sipper v. Urban, *supra*, note 49.

[55] Walker v. City of San Gabriel, 20 Cal. 2d 879, 129 P. 2d 349 (1942); Vaughn v. Board of Police Commissioners, 59 Cal. App. 2d 771, 140 P. 2d 130 (1943); Brant v. Retirement Board of San Francisco, 57 Cal. App. 2d 721, 135 P. 2d 396 (1943); Murphy v. Retirement Board, 49 Cal. App. 2d 58, 121 P. 2d 101 (1942); Diercsen v. Civil Service Commission, 43 Cal. App. 2d 53, 110 P. 2d 88 (1941). See cases cited *supra* note 50.

[56] Drummey v. State Board of Funeral Directors, 13 Cal. 2d 75, 87 P. 2d 848 (1939); Laisne v. State Board of Optometry, 19 Cal. 2d 831, 123 P. 2d 457 (1942). It should be noted in this regard that the more recent cases in this line have not used the language of compulsion but have said that the courts "may" exercise an independent judgment on the facts. This discretionary aspect of the trial court's review power on mandate is strongly emphasized in the later cases. See Sipper v. Urban, 22 Cal. 2d 138, 137 P. 2d 425 (1943); Dare v. Board of Medical Examiners, 21 Cal. 2d 790, 136 P. 2d 304 (1943).

[57] See Drummey, Dare and Sipper cases, *supra*, note 56. This presumption based upon the provisions of Code Civ. Proc., Sec. 1963 (15), is that official duties have been regularly performed. It has the effect of an admonition to the court and of casting the burden of proof upon the person seeking to overthrow the administrative action.

[58] See Dare v. Board of Medical Examiners, *supra*, note 56.

[59] Russell v. Miller, 21 Cal. 2d 817, 136 P. 2d 318 (1943).

[60] The Drummey case, *supra*, note 56, spoke of an independent judgment on the facts without discussing the right to introduce new evidence. The Laisne case, *supra*, note 56, spoke of a trial de novo, apparently without limitation, while the Dare case, *supra*, note 56, attempted to prescribe definite conditions under which additional evidence could be introduced before the court and spoke of a qualified trial de novo.

decisions[61] and concurring and dissenting opinions in Supreme Court cases.[62]

The procedure which is to be followed upon judicial review of administrative action by the writ of mandate is equally uncertain. Where the normal quasi-judicial power of local agencies is concerned, the remedy is a parallel for the writ of review and it would seem that the record of the administrative agency's action is essential to the court's determination. Where the limited quasi-judicial power of a state-wide agency is involved, the record of proceedings before the board is ordinarily essential,[63] but not indispensable,[64] to the court's action. Under both types of administrative action the actual practice differs, so that the transcript of proceedings before the board is sometimes attached as part of the petitioner's pleading, sometimes attached to the respondent's return to the writ, and sometimes introduced in evidence at the court hearing. It has been indicated that the respondent board should normally attach the record as part of its return or have it available at the trial for the use of the court.[65] Where the petitioner attaches a copy of the transcript to his petition, it has been held that the court may exercise is discretionary power to deny the issuance of the writ upon the theory that the petition plus the transcript shows that petitioner has no cause of action.[66] The courts apparently are in some confusion on this point, however, because despite the fact that such cases are decided upon a pleading point (by sustaining a general demurrer for failure to state a cause of action), the courts frequently decide that the evidence in the transcript is sufficient to support the board's action.[67] Conversely, however, it has been held that the allegations of a defective petition for mandate can not be supplied by reference to the transcript of proceedings before the agency which is attached to the petition.[68]

Several other factors require mention. It has been well established in mandate proceedings that, although the court will invalidate an abuse of discretion where it is found, it will not attempt to direct or control the discretion vested in an administrative agency [69] and this principle has

[61] See Wyatt v. Cerf, 64 Cal. App. 2d 732, 148 P. 2d 309 (1944). Compare Madruga v. Borden Co., 63 Cal. App. 2d 116, 146 P. 2d 273 (1944).

[62] See the Laisne case, *supra*, note 56, the Dare case, *supra*, note 56, the Russell case, *supra*, note 59, and the Sipper case, *supra*, note 56.

[63] Dare v. Board of Medical Examiners, *supra*, note 56.

[64] Russell v. Miller, *supra*, note 59.

[65] Dare v. Board of Medical Examiners, *supra*, note 56.

[66] Sipper v. Urban, *supra*, note 56; Zemansky v. Board of Police Commissioners, 61 Cal. App. 2d 450, 143 P. 2d 361 (1943); Vaughn v. Board of Police Commissioners, 59 Cal. App. 2d 771, 140 P. 2d 130 (1943); Newport v. Caminetti, 56 Cal. App. 2d 557, 132 P. 2d 897 (1943); Meyer v. Board of Public Works, 51 Cal. App. 2d 456, 125 P. 2d 50 (1942); Tobinsky v. Board of Medical Examiners, 49 Cal. App. 2d 591, 121 P. 2d 861 (1942); Hansen v. State Board of Equalization, 43 Cal. App. 2d 176, 110 P. 2d 453 (1941).

[67] See, with one judge dissenting on this point, Meyer v. Board of Public Works, 51 Cal. App. 2d 456, 125 P. 2d 50 (1942); Vaughn v. Board of Police Commissioners, 59 Cal. App. 2d 771, 140 P. 2d 130 (1943); Tobinsky v. Board of Medical Examiners, 49 Cal. App. 2d 591, 121 P. 2d 861 (1942).

[68] Dierssen v. Civil Service Commission, 43 Cal. App. 2d 53, 110 P. 2d 88 (1941); Bennett v. Brady, 17 Cal. App. 2d 114, 61 P. 2d 530 (1936).

[69] Inglin v. Hoppin, 156 Cal. 483, 105 P. 582 (1909); Doble Steam Motors Corporation v. Daugherty, 195 Cal. 158, 232 P. 140 (1924).

been followed since the expansion in the use of the writ.[70] A jury trial is obtainable in the discretion of the court, apparently,[71] and in that event there is some question as to what issues of fact may be submitted to the jury. They should not be the issues theretofore considered by the board in view of the rule that the court is not empowered to substitute its judgment for that of the agency. Under the independent judgment test, however, it might be held that a jury determination contrary to that reached by the board would demonstrate an abuse of its discretion but this issue is as yet undetermined by the courts.

Special statutory proceedings. In addition to the situations already mentioned in which the Legislature has attempted to designate one or more of the standard remedies as the means for reviewing the actions of particular agencies or has specified the scope of review, there are several situations in which it has attempted to create special proceedings for this purpose.

The Legislature has attempted in certain situations to provide for an "appeal" to the courts from the action of an administrative officer or board. Since the appellate jurisdiction of the courts is fixed by the Constitution, this type of provision is unconstitutional if it has the effect of altering that appellate jurisdiction.[72] Where the form of procedure is called an "appeal," however, it may still be held constitutional if the court determines that a wholly new proceeding in the court is contemplated and that no true appeal is involved.[73] Sometimes, in providing a special statutory form of action, the Legislature has called the proceeding a "review." Since the writ of review is provided in the Constitution, its historic function can not be altered by a legislative provision attempting to apply it to bodies which do not exercise strictly judicial power. Thus, if the word "review" were construed to mean the writ of review, such legislation would be unconstitutional.[74] Where, however, the court has concluded that the Legislature did not mean to specify the writ of review by its use of the word "review," the legislation has been sustained as a general statutory provision for judicial investigation into administrative action.[75]

In providing a special form of action the Legislature can not create an original proceeding in the superior court where the effect is to impose non-judicial, administrative duties on the court or where the legislation applies to such a small class of persons that it constitutes special legislation.[76] The prohibition against special legislation, if strictly interpreted, would seem to prohibit any form of action limited to the orders of a particular administrative board, but several statutes of this nature

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[70] Bila v. Young, 20 Cal. 2d 865, 129 P. 2d 364 (1942); King v. Board of Medical Examiners, 65 Cal. App. 2d 644, 151 P. 2d 282 (1944); see Mosesian v. Parker, 44 Cal. App. 2d 544, 112 P. 2d 705 (1941).

[71] Sparks v. Board of Dental Examiners, 25 Cal. App. 2d 341, 77 P. 2d 233 (1938).

[72] Const., Art. VI, Secs. 4, 4b, 5; Mojave River Irrigation District v. Superior Ct., 202 Cal. 717, 262 P. 724 (1928); Millsap v. Alderson, 68 Cal. App. 518, 219 P. 460 (1900). This constitutional requirement has been held to prevent the Legislature from prescribing an appeal from the action of a local board of supervisors, acting in a quasi-judicial capacity. Chinn v. Superior Court, 156 Cal. 478, 105 P. 580 (1909).

[73] Collier & Wallis v. Astor, 9 Cal. 2d 202, 70 P. 2d 171 (1937).

[74] Mojave River Irrigation District v. Superior Court, *supra*, note 72.

[75] Ray v. Parker, 15 Cal. 2d 275, 101 P. 2d 665 (1940); Agricultural Prorate Commission v. Superior Court, 31 Cal. App. 2d 518, 88 P. 2d 253 (1939).

[76] Mohave River Irrigation District v. Superior Court, *supra*, note 72.

have been enacted,[77] and court decisions have sustained them, possibly because they include a broad enough class of persons to avoid the danger of constituting special legislation.

As indicated in the opening part of this section, the Legislature has played a relatively small part in prescribing procedure for the judicial review of administrative action. This reluctance to act is understandable, of course, in view of the numerous constitutional restrictions with which its power is circumscribed. Where the Legislature has been given full power to act, as with the Industrial Accident Commission and the Railroad Commission, more detailed provisions are found, but no attempt has been made to discuss these agencies or their procedure in this report.

Stay of execution. Code Civ. Proc., Sec. 949, provides for an automatic stay of execution except in situations otherwise covered specifically. If an appeal is taken from a judgment granting mandate, the court need not allow the appeal to act as a stay if petitioner can show that he will be damaged irreparably in his business or profession.[78] If mandate is denied there is no such specific provision. A stay of execution, however, can operate only on a judgment which commands or permits some act to be done; if a judgment is effective by itself there is nothing to restrain.[79]

Supersedeas is an extraordinary writ issued by an appellate court to a lower court or officer thereof directing that execution or enforcement of a judgment be stayed pending appeal.[80] The appellate court has inherent power to issue the writ, but the writ is an incident to and in aid of appellate jurisdiction.[81] The writ issues in the discretion of the court and not as a mater of right.[82] It has been held frequently that supersedeas, as well as statutory stay of execution, is inappropriate if the judgment is self-executing and requires no process for enforcement.[83] Supersedeas is not available to keep an alternative writ of prohibition in force pending an appeal.[84]

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[77] Alcoholic Beverage Control Act, Deering's Gen. Laws, 1944, Act 3796, Sec. 46; Unemployment Insurance Act, Deering's Gen. Laws, 1944, Act 8780d, Sec. 45.10; State Bar Act, Business & Prof. Code, Sec. 6083.

See In re Shattuck, 208 Cal. 6, 279 P. 908 (1929); Louis Eckert Brewing Co. v. Unemployment Reserves Commission, 47 Cal. App. 2d 844, 119 P. 2d 227 (1941). In Bray v. Superior Court, 92 Cal. App. 428, 268 P. 374 (1928), the court reached the conclusion that the Water Commission Act (which had been involved in the Mojave case, *supra*, note 72) was not unconstitutional as special legislation in providing for an original action in the superior court by appropriators of water. The Bray case was approved in Wood v. Pendola, 1 Cal. 2d 435, 35 P. 2d 526 (1934).

[78] Code Civ. Proc., Sec. 1110b.

[79] Boggs v. No. American Bond etc. Co., 6 Cal. 2d 523, 58 P. 2d 918 (1936); Wolf v. Gall, 174 Cal. 140, 162 P. 115 (1916).

[80] Rosenfeld v. Miller, 216 Cal. 560, 15 P. 2d 161 (1932); In re Imperial Water Co., 199 Cal. 556, 250 P. 394 (1926); Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 P. 69 (1914).

[81] McCann v. Union Bank, 4 Cal. 2d 24, 47 P. 2d 283 (1935); People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930).

[82] Private Investors v. Homestake Min. Co., 11 Cal. App. 2d 488, 54 P. 2d 535 (1936).

[83] Stewart v. Hurt, 9 Cal. 2d 39, 68 P. 2d 726 (1937); Hulse v. Davis, 200 Cal. 316, 253 P. 136 (1927); Tyler v. Presley, 72 Cal. 290, 13 P. 856 (1887) (appeal from judgment suspending attorney); Norton v. Municipal Court, 8 Cal. App. 2d 368, 48 P. 2d 124 (1935) (appeal from denial of writ of prohibition); People ex rel Boarts v. City of Westmoreland, 135 Cal. App. 517, 27 P. 2d 394 (1933) (appeal in quo warranto proceeding); Erickson v. Municipal Court, 131 Cal. App. 327, 21 P. 2d 480 (1933) (appeal from denial of certiorari); Lickley v. County Bd. of Education,

There is some indication that the situations in which supersedeas may be issued are increasing, and that the courts are not entirely satisfied with the strict rules as they exist now. Prohibitory injunctions have long been held to be self-executing, and the courts in doubtful cases have held some injunctions to be mandatory in order to issue supersedeas. Recently a writ was issued in a case involving a prohibitory injunction.[85]

3. Comparative Legislation

Parties entitled to review. A few of the statutes studied attempt to specify the parties entitled to review by providing that "any party aggrieved" or "adversely affected" by an administrative adjudication may seek court relief.[86] So general a definition leaves the determination of proper parties to the courts,[87] and is, therefore, futile.[88]

Form of action to obtain review. Some statutes allow appeals from administrative agencies directly to the courts in the same or in a similar manner as in civil actions.[89] Other statutes merely codify the rights to the various remedies heretofore employed by providing that legal, equitable or declaratory relief is available as well as the remedies afforded by the extraordinary writs.[90] Still other statutes provide that review may be had by a special statutory proceeding initiated by a petition in the manner of a petition for an extraordinary writ.[91] In New York such legislation abolishes all the extraordinary writs except *habeas corpus,* thereby simplifying the law and facilitating relief. A similar proposal is incorporated in the *Minn. Proposed Rev. Act;* the *Ill. Proposed Jud. Rev. Act* provides that the petition allowed thereunder shall be the exclusive means of obtaining judicial review, but does not attempt to abolish the writs for all purposes. None of these acts purports to curtail the relief obtainable.[92]

The time within which relief must be sought whether by appeal or special proceeding varies from 15 days to 4 months, with the average being 30 days.

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62 Cal. App. 527, 217 P. 133 (1933) (appeal from denial of writ of prohibition); In re Graves, 62 Cal. App. 168, 216 P. 386 (1923) (appeal from judgment suspending attorney). But see Painless Parker v. Bd. of Dental Examiners, 108 Cal. App. 150, 291 P. 421 (1930) which indicates in a dictum that the cases in which appeals were taken after a denial of certiorari are not controlled by the cases involving appeals after denial of prohibition, and that in the certiorari cases there might be something in the nature of a writ of execution which could be stayed.

[84] Lickley v. County Bd. of Education, *supra,* note 83; Wood v. Bd. of Fire Com., 50 Cal. App. 594, 195 P. 739 (1920).

[85] See Note, "Supersedeas: Use of the Writ to Stay Prohibitory Injunctions," (1942) 30 Cal. L. Rev. 209.

[86] A. B. A. Proposed Act, Sec. 9 (a); Model Act, Sec. 11 (1); N. D. Unif. Prac. Act, Sec. 15; U. S. Sen. Bill 674, Sec. 311 (b).

[87] Comment to A. B. A. Proposed Act, (1944) 20 A. B. A. Jour. 44.

[88] Atty. Gen. Rep., p. 85.

[89] N. C. Revoc. of Licenses Act, Sec. 150-4; N. D. Unif. Prac. Act, Sec. 15; Ohio Unif. Proced. Act, Sec. 154-73; Pa. Proposed Prac. Act, Sec. 41.

[90] A.B.A. Proposed Act, Sec. 9 (b); U. S. Sen. Bill 674, Secs. 311 (a), (b).

[91] Ill. Proposed Jud. Rev. Act, Sec. 1; Minn. Proposed Review Act, Sec. 1; Model Act, Sec. 11; N. C. Proposed Unif. Proced. Act, Sec. 9 (b); N. Y. Civil Practice Act, Sec. 1283 et seq.

[92] On the character of the extraordinary writs as vestigial branches of common-law pleading and the procedural difficulties caused thereby see Third Annual Report of the Judicial Council of New York (1937), p. 129 et ff.

Courts and venue. All of the statutes studied provide that the relief may be sought in the lowest court of general jurisdiction. The venue is generally to be laid in a county where the respondent before the agency resided or did business, where the hearing was held or where the events complained of occurred.[93]

Reviewable orders. All of the statutes studied provide that only final orders are reviewable. The determination of what constitutes a final order is affected by the doctrine of exhaustion of administrative remedies. One of the statutes provides that no order shall be considered final if the right to a rehearing before the agency has not been exhausted.[94] Another provides that review may not be sought until the time for rehearing has lapsed.[95] Two statutes provide that no order shall be considered not to be final because of failure to request reconsideration by the agency.[96]

Interim relief. All of the statutes studied provide that the bringing of an action for judicial review shall not operate as an automatic stay of the administrative order, but that the court may order a stay if necessary to preserve the rights of the parties and upon such conditions or supersedeas bonds as the court considers adequate.

Scope of review. The scope of review is generally limited to the determination of whether the order of the agency is (1) in violation of constitutional provisions, (2) in excess of statutory authority or jurisdiction, (3) made on the basis of unlawful procedure, (4) affected by other error of law, (5) unsupported by substantial evidence on the entire record, (6) arbitrary or capricious.[97]

The principal discrepancies between the statutes are on the weight to be given to the findings of the agency. The most common test is that the findings of the agency are not to be disturbed if they are supported by "substantial evidence on the whole record."[98] Other tests are that the findings are to be deemed "*prima facie* true";[99] that they shall not be upset if supported by "sufficient evidence"[100] or "reasonable and competent evidence"[101] or merely "evidence."[102] The *N. Y. Civil Practice Act* provides that all findings must be based on "competent evidence,"[103] and must be set aside if there was such a preponderance of proof against the facts found as to warrant setting aside the verdict of a jury affirming the facts.[104]

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[93] Pa. Proposed Prac. Act, Sec. 41, provides that appeals are to be taken to the Court of Common Pleas of Dauphin County.

[94] Ill. Proposed Jud. Rev. Act, Sec. 1.

[95] N. Y. Civil Practice Act, Sec. 1285.

[96] A.B.A. Proposed Act, Sec. 9 (d); U. S. Sen. Bill 674, Sec. 311 (d).

[97] Model Act, Sec. 12; see also A.B.A. Proposed Act, Sec. 9 f, adding a special provision for those cases where a trial de novo has been authorized by statute; Minn. Proposed Rev. Act, Sec. 9; N. C. Proposed Unif. Proced. Act, Sec. 9; N. D. Unif. Prac. Act, Sec. 19; N. Y. Civil Practice Act, Sec. 1296, adding special provisions to compel performance of duties enjoined by law in lieu of the writ of mandate; Pa. Proposed Prac. Act, Sec. 44; U. S. Sen. Bill 674, Sec. 311 (e).

[98] A.B.A. Proposed Act, Sec. 9 f (5); Model Act, Sec. 12 (5); Pa. Proposed Prac. Act, Sec. 44; U. S. Sen. Bill 674, Sec. 311 (e) (5).

[99] Ill. Proposed Jud. Rev. Act, Sec. 10.

[100] Minn. Proposed Review Act, Sec. 9 (5).

[101] N. C. Proposed Unif. Proced. Act, Sec. 9 (b) (4).

[102] N. D. Unif. Prac. Act, Sec. 19.

[103] Sec. 1296 (6).

[104] Sec. 1296 (7).

It is generally provided that the court in its review is confined to the record except that it may take evidence of irregularities of procedure not disclosed by the record.[105] If a proper showing is made to the court as to the need for and propriety of allowing additional evidence the court may remand the case to the agency to take the evidence and make further findings.[106] Only the *Ohio Unif. Proced. Act* provides that the court itself may take further evidence.[107]

Order by the court. Several of the statutes provide that the court may affirm, reverse or modify the agency decision [108] but it is not clear whether this refers merely to the findings of fact or to the orders. The *N. D. Unif. Prac. Act* states that if the court modifies or reverses the decision, it shall remand the case to the agency for disposition.[109] The *Ill. Proposed Jud. Rev. Act*, to the contrary, provides that the court shall "enter such order, determination or decision as is justified by law."[110]

4. Published Comment

The Attorney General's Committee report stated that the main function of judicial review is to act as "a check against excess of power and abusive exercise of power in derogation of private right." Judicial review rarely is available to compel enforcement of law by administrators.[111] Even when it is available, the effective use of judicial review is limited by the volume of adjudicated cases, the cost to the litigants, and the fact that many business transactions can not wait until a review is decided. Judicial review, then, can be expected only to check and not to supplant administrative action. "Review must not be so expensive as to destroy the values—expertness, specialization and the like—which, as we have seen, were sought in the establishment of administrative agencies."[112]

Many of the Federal statutes are silent or vague on the subject of judicial review.[113] And courts have enumerated only general standards which guide but do not compel, and leave considerable room for judgment. It has been established that generally only a person with legal standing can attack an administrative act, and review is not available in regard to preliminary or procedural matters.[114]

Assuming that a case is subject to some kind of review, Benjamin stated that: "Discussion of the problems involved and understanding of the judicial decisions, may be aided by distinguishing three types of quasi-judicial determinations—determinations of fact, determinations

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[105] Ill. Proposed Jud. Rev. Act, Sec. 10; Minn. Proposed Review Act, Sec. 9 (1). The N. C. Revoc. of Licenses Act, Sec. 150-4 presents the anomalous procedure of allowing the licensee a "trial by jury of the issue of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the trial committee or counsel."

[106] Ill. Proposed Jud. Rev. Act, Sec. 11 (f); Model Act, Sec. 11 (4); N. C. Proposed Unif. Proced. Act, Sec. 9 (b); N. D. Unif. Prac. Act, Sec. 18.

[107] Sec. 154-73.

[108] Model Act, Sec. 12; N. Y. Civil Practice Act, Sec. 1300; Ohio Unif. Proced. Act, Sec. 154-73; Pa. Proposed Prac. Act, Sec. 44.

[109] Sec. 10.

[110] Sec. 10 (g); see also Sec. 10 (h).

[111] Atty. Gen. Rep., p. 76.

[112] *Id.*, at 77.

[113] *Id.*, at 83.

[114] *Id.*, at 84-85.

of law, and determinations as to the exercise of discretion. It is necessary at the same time to note that the precise lines of distinction are not always clear and that accurate classification in a given case may be impossible."[115] As Benjamin also pointed out there is general agreement that questions of law are and should be fully reviewable by the courts.[116] There is considerable difficulty, however, in determining whether a particular question will be reviewed as one of law or fact, and there is a further problem if the question is one of fact as to what test is to be applied.

Distinctions between law and fact are not always drawn clearly in the cases. Abstractly, there may be little confusion. One writer stated that " 'Law' in its best accepted sense refers to precepts generally and uniformly applicable to all persons of like qualities and status and in like circumstances . . . On the other hand, when the law is capable of no further definition, the question whether the facts of the particular case meet the legal norm is a matter of fact and for the fact-finding agency."[117] The courts, however, do not follow this test; frequently the question of whether administrative findings are sustained by substantial evidence is stated to be one of law.[118] One proposed test is that in the administrative law field, courts in judicial review should consider the problems concerning which they are expert, and that technical problems in the fields of the administrators should be left to the agencies. This approach seems to have gained a few adherents, but it is as difficult to draw a line on the basis of expertness as on the old distinction between law and fact, and it is doubtful that this new theory has many advantages over the older and better established concepts.[119]

In any event the distinction between fact and law is one that will be made by the courts, and not the legislatures. Of more immediate interest is the scope of review of a fact question. At one end of the scale of possibilities is the complete retrial of all the issues by a court, or a complete reweighing of the evidence by a court. One writer stated: "The American Bar Association Committee on Administrative Law started off with this [independent judicial review on the facts] as a cardinal principle. As it continued its work the principle was gradually diluted until all that remained in the final draft of the Logan-Walter Bill was a direction to set aside an order if the findings of fact were 'clearly erroneous'; and even this remnant had to be removed before the Senate would pass the bill. Judicial review on the facts can be effectively procured in only one way—by real trials *de novo* in the courts. No one wants that because it means in the end, having a whole new set of courts to duplicate the administrators."[120] Benjamin criticized any review which would substitute the judgment of the court on the evidence for that of the agency.[121] The Attorney General's Committee concluded that an inquiry as to whether administrative findings are supported by

[115] Benj. Rep., p. 327.

[116] *Id.*, at 347.

[117] Brown, "Fact and Law in Judicial Review" (1943) 56 Harv. L. Rev. 899, 904.

[118] *Id.*, at 902-903. See also Atty. Gen. Rep., p. 88.

[119] *Id.*, at 921-927. The theory discussed by Brown was advanced by Dean Landis.

[120] Feller, "Administrative Law Investigation Comes of Age" (1941) 41 Col. L. Rev. 589, 605.

[121] Benj. Rep., pp. 336-338.

the weight of the evidence would be desirable in few if any cases, and stated the following reasons: "[1] there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence can not be legislated away. * * * [2] If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. This would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications."[122]

In a limited number of fact situations the United States Supreme Court has prescribed an independent judgment on the facts. The present extent of this rule is not clear.[123] "Beyond the cases to which these decisions are applicable, judicial review may be restricted to the record before the agency, and the extent of the courts' scrutiny may be narrowed. To state the matter very broadly judicial review is generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are said to be matters of administrative judgment to be determined exclusively by the agency."[124] The test generally applied in the Federal cases is whether the finding is supported by substantial evidence.[125] Benjamin stated that in New York the substantial evidence test has been applied uniformly by the courts whatever the language of the particular review statute.[126]

Substantial evidence is not easy to define. Benjamin quoted a New York case stating that "choice lies with the Board and its finding is supported by the evidence and is conclusive when others might reasonably make the same choice,"[127] and he concluded that the substantial evidence test "is thus a test of the rationality of a quasi-judicial determination, taking into account all the evidence on both sides."[128] He proposed this amendment to the New York Practice Act: The court is to decide " 'Whether, under the entire record of the hearing, each of the findings of fact necessary to support the determination is itself supported by substantial evidence.' "[129] The Attorney General's Committee stated that the substantial evidence test of the Supreme Court required such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[130] Stason has considered the meaning of substantial evidence in a long article, and his definition is this: "The term 'substantial evidence' should be construed to confer finality upon an administrative decision on the facts when upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a

[122] Atty. Gen. Rep., pp. 91-92.

[123] See Atty. Gen. Rep., p. 87; Benj. Rep., pp. 343-344. No attempt has been made herein to summarize the published comment in California with respect to the current California doctrine concerning independent judgment on the facts. These articles, which are too well known to require summarization, are cited at p. 140, *supra*.

[124] Atty. Gen. Rep., p. 87.

[125] *Id.*, at 88.

[126] Benj. Rep., p. 328.

[127] Matter of Stork Restaurant, Inc. v. Boland, 282 N. Y. 256, 274 (1940).

[128] Benj. Rep., p. 329.

[129] *Id.*, at 339.

[130] Atty. Gen. Rep., pp. 92, 89-90.

reasonable man, acting reasonably, *might* have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, *could not* have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside. In effect this is the prevailing rule in jury trials relative to the direction of verdicts, and is also the prevailing rule applied by *appellate courts* in setting aside jury verdicts because contrary to the evidence."[131] This is only one of the possible definitions of substantial evidence, however. Many court opinions have indicated that rules applicable to directed verdicts and new trials are used; sometimes the evidence on one side is not set off against opposing evidence. The general tendency of the Federal courts is to require more than a scintilla of testimony on one side and no consideration of the whole record, but to require much less than a weighing of the evidence. Stason concluded that the analogy to directed verdicts and new trials ordered by appellate courts results in a standard which will neither hamper administrative efficiency nor overload the courts, and that there is much to gain from simplification of concepts and from taking advantage of the established practices in the related fields.[132]

Other tests for the review of facts have been criticized. The Attorney General's Committee stated that provisions to the effect that clearly or plainly erroneous findings, or findings not supported by credible evidence, be set aside are without specific content, and there is no general understanding as to their meaning.[133] Benjamin stated that review should not be more limited than that provided under a substantial evidence test because that test "affords a means of correcting abuses in individual cases and because the cautionary effect of the prospect of such review should help to assure proper administrative adjudication in the first instance.[134]

Separate from the determination by a court of issues of law and fact is the problem of review of administrative determinations as to the exercise of discretion. In New York "The test which the courts ordinarily apply in reviewing quasi-judicial determinations as to the abuse of discretion is thus—like the substantial evidence test—a test of the rationality of the determination; and this is, I think, as a matter of policy, the right test to apply in all but special instances where administrative discretion may be unreviewable * * * In exceptional instances, where the special nature of the subject-matter of adjudication leads to the conclusion that the particular discretion vested in the administrative tribunal is intended to be absolute, the exercise of discretion may, indeed, properly be held to be unreviewable." Questions of discretion "are even more clearly within the special competence of administrative tribunals" than questions of fact.[135] The Attorney General's Committee stated that "There is a category of cases in which judicial review is denied because it is thought that the cases deal with matters which are more fittingly lodged in the exclusive discretion of the administrative branch,

[131] Stason, "'Substantial Evidence' in Administrative Law" (1041) 80 U. of Pa. L. Rev. 1026, 1038.

[132] *Id.*, at 1039-1051. See Stern, "Review of Findings of Administrators, Judges and Juries: A Comparative Analysis," (1944) 58 Harv. L. Rev. 70.

[133] Atty. Gen. Rep., p. 92.

[134] Benj. Rep., p. 338.

[135] Benj. Rep., p. 346.

subject to controls other than judicial review. This category * * * is the product chiefly of judicial self limitation."[136]

There are many methods for questioning administrative action in the courts. The Attorney General's Committee lists private actions at law, equity injunction (which is characterized as the common remedy in the Federal courts and the United States generally), habeas corpus, certiorari, mandamus, prohibition, declaratory judgments and various types of special statutory review.[137] Benjamin discusses a variety of procedures available in New York;[138] the proceedings in the nature of mandate generally are used "to review an administrative determination arrived at otherwise than as the result of a prescribed quasi-judicial hearing."[139] In New York the substitution of one general writ for the remedies of certiorari, prohibition and mandamus is now provided. (p. 145, *supra*) This was recommended first in a Judicial Council Report.[140] In Illinois, appeal, mandamus, certiorari and injunction are used.[141] Occasionally provision is made for review in the first instance by a court other than a trial court. For example, some Federal statutes provide for "(1) review by a three-judge district court convoked for that purpose; or (2) review in a circuit court of appeals."[142]

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[136] Atty. Gen. Rep., p. 86.

[137] *Id.*, at 81-83.

[138] Benj. Rep., pp. 350-368.

[139] *Id.*, at 351.

[140] Third Annual Report of the Judicial Council of New York (1937), pp. 129-198.

[141] Note, "Occupational Licensing in Illinois". (1942) 9 U. of Chi. L. Rev. 694, 711-715.

[142] Atty. Gen. Rep., p. 93. See generally pp. 92-95.

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE AGENCIES SURVEY

A

Appendix

Statutes, Case Law and Comparative Studies

Committee on Administrative Agencies Survey
304 State Building
San Francisco, 2, California

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METHOD OF SURVEY AND SOURCES OF INFORMATION

This project is being conducted under the authorization of Chapter 991 of Statutes of 1943. That legislation directed the Judicial Council to make a thorough investigation of administrative procedure in California and to recommend to the next Legislature a comprehensive plan suitable to the needs of this state, covering both judicial review and procedure before the agencies. The work has been carried on under the direction of a committee of the Judicial Council which includes Justice John T. Nourse, Chairman, Judge C. J. Goodell and Judge Maurice T. Dooling, Jr. The Administrative Agencies Survey staff consists of Ralph N. Kleps, Director, John J. Eagan, and B. Abbott Goldberg.

The investigations conducted by the committee and the staff fall into four main subdivisions:

1. The California statutes were studied to determine the number and nature of administrative agencies in the state. The Committee decided on the basis of that survey that an exhaustive study of the entire administrative field was impossible in the time available, and it was decided to limit the survey to the licensing agencies. It was also decided to eliminate any investigation of the Industrial Accident Commission and the Railroad Commission because of the peculiar status given them by the Constitution. Hearings were then held by the Committee to determine the nature of the structure and procedure followed by representative licensing agencies. Twenty-one agencies in all appeared and testified at these hearings.* After the conclusion of the committee hearings staff members attended disciplinary and other types of hearings held by some of the agencies. Annual reports of the agencies and copies of their rules and forms also were obtained. The Uniform Act should apply to all state agencies exercising licensing powers. But before the precise coverage of the act can be ascertained agencies which did not appear at committee hearings must be investigated in more detail.

2. The case law in California was analyzed and abstracted.

3. Copies of legislation proposed and adopted in the federal system and various states were obtained and studied. These proposals included the two bills proposed by the Attorney General's Committee, the bill recently drafted by the American Bar Association and introduced in Congress, the proposal of the National Conference on Uniform State Laws, and many others.

4. Many texts and law review and bar journal articles were studied. The Benjamin Report on Administrative Adjudication in New York and The Attorney General's Report were particularly helpful.

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*Agencies in the Department of Professional and Vocational Standards: The Board of Dental Examiners, The Board of Medical Examiners, The State Board of Optometry, The California State Board of Pharmacy, The Board of Examiners in Veterinary Medicine, The State Board of Accountancy, The California State Board of Architecture, The State Board of Barber Examiners, The State Board of Registration for Civil Engineers, The Contractors' State License Board, The State Board of Cosmetology, The State Board of Funeral Directors and Embalmers, The Structural Pest Control Board, The Yacht and Ship Brokers Commission, The Bureau of Furniture and Bedding Inspection and The Board of Nurse Examiners; other agencies: The Division of Corporations, The Department of Insurance, The Division of Real Estate, The Board of Osteopathic Examiners, and The State Board of Chiropractic Examiners.

During the spring and summer of 1944 the committee and the staff held frequent meetings at which the background material was considered and proposed statutes and constitutional amendments were studied. The Tentative Draft grew out of these meetings. A considerable portion of the material referred to above has been summarized and published in this Appendix to the Tentative Draft. The balance is available in the files maintained in connection with the survey.

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

1. California Statutes and Practice, and

2. California Cases.

The California Constitution imposes definite limitations with respect to the procedures which are available for the judicial review of administrative action, and therefore most statutes are noncommital on the subject. Many statutes are silent (Chiropractic, Dental, Medical, Nurse, Optometry, Pharmacy). Some provide that an administrative decision is "subject to review" (Contractors, Pest Control), "subject to examination in the courts" (Architectural), "subject to such review as is permitted or authorized by law" (Insurance), or is subject to "judicial review in accordance with law," (Real Estate, Veterinary, Yacht). Statutes have provided that review may be had by commencing "an action to compel approval" (Osteopathic) or by a "proceeding in a court of competent jurisdiction" which "is governed by the Code of Civil Procedure" (Cosmetology). In certain cases the Legislature has attempted to designate the procedure to be used by specifying the writs of review, mandate or prohibition (Corporations), and in one case a statute has provided that the decision of a board as to examinations shall not be "subject to review by any court or other authority" (Nurse).

Generally speaking, writs of mandate and equity actions are used most frequently to secure judicial review of administrative action. Actions for declaratory relief and writs of review are also used, as are specific proceedings designated by the Legislature in particular cases. The power of the courts to determine any justiciable issue properly brought before them often furnishes the basis for judicial review in situations where there is no statutory provision as to the judicial review of administrative action[1]. or where the procedure designated by the Legislature cannot be used constitutionally.[2].

General limitations imposed by the courts require that proceedings for reviewing administrative action be brought within a reasonable time (where none is specified by statute)[3]. and that the action should not be brought prior to the exhaustion of all administrative remedies provided.[4].

Actions at law. The action at law for damages has been regarded

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1. Bodinson Mfg. Co. v. Calif. Employ. Comm., 17 Cal.2d 321, 109 P.2d 935 (1941).

2. Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425 (1943); Hogg v. Real Estate Commissioner, 54 Cal. App.2d 712, 129 P.2d 709 (1942).

3. Orwitz v. Board of Dental Examiners, 55 Cal. App.2d 888, 132 P.2d 272 (1942); Campbell v. City of Los Angeles, 47 Cal. App.2d 310, 117 P.2d 901 (1941); Pacheco v. Clark, 44 Cal. App.2d 147, 112 P.2d 67 (1941); see Brown v. State Personnel Board, 43 Cal. App.2d 70, 110 P.2d 497 (1941).

4. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942 (1941)--mandate; Metcalf v. County of Los Angeles, 24 Cal.2d ___, 148 P.2d 645 (1944) (24 A.C. 250)--injunction; Imp. Mut. Life Ins. Co. v. Caminetti, 59 Cal. App.2d 501, 139 P.2d 691 (1943)--declaratory judgment.

as one of the well-established means for reviewing administrative action.[5].

There has been very little use made of this procedure in California as a means for reviewing or checking administrative action because of the limited issues which may be presented. The action will not lie where the administrative officer or agency has acted within the limits of discretionary power, whether that discretion be legislative or judicial in nature.[6]. The issues which can be presented where discretionary action is involved are limited to excess of jurisdiction on the part of the administrative officer or agency or abuse of discretion,[7]. and if the excess of jurisdiction results from the unconstitutionality of the statute under which the officer has acted, immunity from liability exists for him under the provisions of Government Code, sec. 1955.[8]. Negligence in the performance of ministerial duties imposes civil liability upon administrative officers, but in the field which is being considered here discretion is nearly always involved in the acts of the administrative officer or agency. For these reasons, the civil action for damages can not be considered as an effective means for reviewing quasi-legislative action by administrative agencies in California, and there is no indication that it has been used to any great extent in actual practice.

The principles which have been discussed concerning use of the civil action for damages as a means of reviewing quasi-legislative acts of administrative agencies in California apply generally to its use where quasi-judicial administrative acts are involved. Thus, where discretionary administrative power of a quasi-judicial nature is involved, the review by such an action is limited to acts in excess of jurisdiction and acts which constitute an abuse of discretion.[9]. The action for damages has not furnished a practicable means, therefore, for reviewing the quasi-judicial actions of administrative officers and it has not been used in California.

Equity injunction and declaratory judgment. The inadequacy of the action at law as a means for reviewing administrative action led to the use of the suit in equity, and this procedure has been characterized as the common remedy in the United States for relief against administrative action.[10]. The right to obtain relief in equity against administrative action depends, as in other cases, upon the inadequacy of other remedies and the establishment of irreparable injury.[11]. In addition, the availability of the remedy

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5. Atty. Gen. Rep., p. 81.

6. David, "Tort Liability of Public Officers" (1939) 12 S.C. L. Rev. 127, 149, 360; 21 Cal. Jur. 908, et seq.

7. David, supra, note 6; 43 Am. Jur. 86, et seq.; (1933) 85 A.L.R. 298.

8. Formerly Civil Code, sec. 3342; see David, supra, note 6, at 148.

9. Ballerino v. Mason, 83 Cal. 447, 23 P. 530 (1890); Downer v. Lent, 6 Cal. 94 (1856); Jones v. Richardson, 9 Cal. App.2d 657, 50 P.2d 810 (1935); see David, supra, note 6, at 260, 279.

10. Atty. Gen. Rep., p. 81; 42 Am. Jur. 667; cf. 14 Cal. Jur. 200-205.

11. Metcalf v. County of Los Angeles, 24 Cal.2d ___ (24 A.C.A. 250), 148 P.2d 645 (1944); Donato v. Board of Barber Examiners, 56 Cal. App.2d 916, 133 P.2d 490 (1943).

is affected by the provisions of section 526 of the Code of Civil Procedure, and section 3423 of the Civil Code, both of which provide:

> "An injunction cannot be granted: . . . (4) To prevent the execution of a public statute by officers of the law for the public benefit. . . . (6) To prevent the exercise of a public or private office, in a lawful manner, by the person in possession; (7) To prevent a legislative act by a municipal corporation."

These limitations upon the power of equity courts to grant injunctions in certain cases have been sustained by the courts, either as legislative restatements of familiar principles of equity or as limitations which affect the rights of the individuals rather than the power of the courts.[12] These statutory limitations upon the power of equity courts have been held not to apply in California when the legislation involved is invalid, upon the theory that the statutory protection against injunctive action was intended to apply only in favor of valid legislative action, and this exception applies to both ordinances and statutes which are unconstitutional.[13] Thus, where a challenge is made to the constitutionality of the statute or ordinance under which the administrative agency is acting, or where it is claimed that the statute or ordinance (though constitutional generally) is unconstitutional as applied by the administrative agency, the remedy of an equity injunction is available on behalf of the aggrieved party.[14] It has also been held that the remedy of an equity injunction is available to an aggrieved party, even though a constitutional statute is involved, if the administrative order issued under the statute is in fact invalid.[15] It follows therefore, that in such a proceeding for an equity injunction against quasi-legislative action the scope of the court's investigation extends to the question of the validity of the statute or ordinance and also to the question of the validity of the administrative action taken under the statute.

The foregoing discussion deals with the availability of an equity injunction apart from any special statutory provisions. Occasionally, however, the Legislature has provided specifically that

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12. Reclamation District No. 1500 v. Superior Court, 171 Cal. 672, 154 P. 845 (1916).

13. Wheeler v. Herbert, 152 Cal. 224, 92 P. 353 (1907); Bueneman v. City of Santa Barbara, 8 Cal.2d 405, 65 P.2d 884 (1937). Cf. Reclamation District No. 1500 v. Superior Court, supra, note 12, in which the court points out that in some states these statutory limitations upon the power of equity are held to apply even though the statute is unconstitutional.

14. Calif. Drive-In Restaurant Assn. v. Clark, 22 Cal.2d 287, 140 P.2d 657 (1943); Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665 (1940).

15. Challenge Cream etc. Assn. v. Parker, 23 Cal.2d ___ (23 A.C. 134), 142 P.2d 737 (1943); Brock v. Superior Court, 11 Cal.2d 682, 81 P.2d 931 (1938); Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 55 P.2d 495 (1936); Agricultural Prorate Commission v. Superior Court, 31 Cal. App.2d 518, 88 P.2d 253 (1939). This use of an equity injunction where a valid statute is involved, but where the court concludes that the administrative officer or agency has gone beyond the scope of the statute, seems very recent in California. The cases give no explanation for the use of injunction where a constitutional statute is involved.

injunctive relief shall be available to the review of certain types of administrative action. In such cases, the normal prerequisites to obtaining injunctive relief would not have to be established and presumably the scope of review would extend to any issues concerning the validity of the administrative action.[16]

Equity injunctions have been used as a means of reviewing quasi-judicial action in California, subject to the requirements of irreparable injury, inadequacy of other remedy, and to the statutory limitations mentioned under the review of quasi-legislative action where the enforcement of a public statute is involved. Cases have held that the remedy of an equity injunction is not available where other remedies are adequate.[17] The courts have held that the provisions of Civ. Code, sec. 3423, and Code Civ. Proc., sec. 526 (Appendix, p. 95) prohibit the issuance of an injunction to restrain the enforcement of a valid statute.[18] In California these statutes do not prevent the issuance of an injunction where the statute is unconstitutional or where, though constitutional, the administrative agency or officer proposes to apply it in an unconstitutional manner. These issues can be raised by bringing an equity action.[19] In the judicial review of quasi-judicial action, however, the equity injunction has apparently not been used as a means of investigating whether the administrative agency or officer is acting within the authority granted by a valid statute, unless the action would result in an unconstitutional application of the statute.[20] In this respect a differentiation is to be made between the use of the equity injunction for reviewing quasi-legislative action, and its use in reviewing quasi-judicial action of administrative boards and agencies. Similarly, no specific statutes have been found authorizing the use of injunctive procedure where quasi-judicial administrative acts are involved.

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16. Such a provision exists with respect to the power of the Commissioner of Corporations to make orders requiring the discontinuance of "unsafe or injurious" practices by industrial loan companies. Deering's Gen. Laws, Supp. 1941, Act 3603, sec. 11, provides: "Such company shall have 10 days after any such order is made final in which suit may be commenced to restrain enforcement of such order. . . ."

17. Moore v. Superior Court, 6 Cal.2d 421, 57 P.2d 1314 (1936) [mandamus available]; Vincent Petroleum Corp. v. Culver City, 43 Cal. App.2d 511, 111 P.2d 433 (1941) [mandamus or certiorari available]; Saxon v. State Board of Education, 137 Cal. App. 167, 29 P.2d 873 (1934) [certiorari available].

18. Skinner v. Coy, 13 Cal.2d 407, 90 P.2d 296 (1939); Loftis v. Superior Court, 25 Cal. App.2d 346, 77 P.2d 491 (1938); Daugherty v. Superior Court, 23 Cal. App.2d 739, 74 P.2d 549 (1937); State Board of Equalization v. Superior Court, 5 Cal. App.2d 374, 42 P.2d 1076 (1935).

19. Skinner v. Coy, supra, note 18; Brock v. Superior Court, 12 Cal.2d 605, 86 P.2d 805 (1939); People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3 (1930).

20. In a number of cases the court has not gone beyond the determination that a valid statute is involved; see State Board of Equalization v. Superior Court, supra, note 18; Loftis v. Superior Court, supra, note 18; Daugherty v. Superior Court, supra, note 18. Cf. Brock v. Superior Court, supra, note 19, in which the court indicated that it would investigate whether the statute was being applied in an unconstitutional manner.

In addition to the equity injunction, actions for declaratory relief are frequently brought to challenge the validity of administrative rulings which are quasi-legislative in nature.[21]. The conditions under which relief is available are specified by statute[22]. and where a proper case is brought the procedure results in a declaration of the validity or invalidity of the administrative regulation. There is no indication that such relief would be available where quasi-judicial action is involved, and in any case the court has discretion as to whether or not the remedy is necessary or proper at the time and under all the circumstances of the case.[23].

Writ of review and writ of prohibition. The common law writ of certiorari is called the writ of review in California.[24]. The power to issue this writ and the writ of prohibition is given by the Constitution to the Supreme Court, the District Courts of Appeal and to the Superior Courts.[25]. The writ of review is provided for by statute and lies where an inferior tribunal exercising judicial functions has exceeded its jurisdiction and there is no appeal or other adequate remedy.[26]. The writ of prohibition is also covered by statute and it is available to arrest the proceedings of any tribunal exercising judicial functions where the proceedings are in excess of its jurisdiction and there is no adequate remedy otherwise.[27]. Both writs are treated together in this discussion because the principles governing their use are virtually the same.

One problem discussed with reference to other actions to review administrative proceedings can be eliminated quickly. These writs are available only for the purpose of reviewing action which is judicial in nature, and thus it follows that any action of a legislative nature cannot be challenged in the courts by either writ.[28].

For many years both these writs were generally available in California for the purpose of challenging administrative adjudication.[29]. In recent years, however, limitations have been put upon

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21. Calif. Drive-In Assn. v. Clark, 22 Cal.2d 287, 140 P.2d 657 (1943); Viner v. Civil Service Comm. of San Francisco, 59 Cal. App.2d 458, 139 P.2d 88 (1943); cf. Louis Eckert Brewing Co. v. Unemployment Res. Comm., 47 Cal. App.2d 844, 119 P.2d 227 (1941).

22. Code Civ. Proc., secs. 1060-1062a, provide that any person interested under a "written instrument" can secure a declaration of his rights and duties, including the determination of any question of construction or validity arising under such instrument. This language has been construed by the courts to extend to the question of the construction and validity of administrative rules and regulations.

23. Code Civ. Proc., sec. 1061.

24. Code Civ. Proc., sec. 1067.

25. Const., Art. VI, secs. 4, 4b, 5.

26. Code Civ. Proc., secs. 1067-1077.

27. Code Civ. Proc., secs. 1102-1105.

28. The statutes require that "judicial functions" be involved. See Code Civ. Proc., secs. 1068, 1102.

29. Writ of review: State Board of Chiropractic Examiners v. Superior Court, 201 Cal. 108, 255 P. 749 (1927); Suckow v. Alderson, 182 Cal. 247, 187 P. 965 (1920). Writ of prohibition: Chapman

the use of both of these writs by judicial decision.[30] Their use is now restricted to situations where the action involved can be said to be strictly judicial in nature, and the result is that neither writ is available where the action of an administrative agency of state-wide jurisdiction is involved.[31] A limited field remains, therefore, in which the writs of review and prohibition are available for the purpose of challenging administrative action. In this field the major groups are: the quasi-judicial acts of local administrative agencies[32] and the acts of certain state officers or bodies which are characterized as judicial in nature.[33]

Where available, the scope of the judicial investigation on a writ of review or a writ of prohibition is limited to so-called jurisdictional questions.[34] The jurisdictional test which applies here, however, is not identical with the concept of jurisdiction used in connection with such problems as are involved in a collateral attack upon a judgment. Where the writs of review and prohibition are involved, a broader concept of jurisdiction is utilized by the courts. Relief is available where the action of the tribunal exceeds

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v. Stoneman, 63 Cal. 490 (1883); Hevren v. Reed, 126 Cal. 219, 58 P. 536 (1899). See also Rode, "Administrative Adjudication in California and its Review by the Writ of Certiorari," (1937) 25 Calif. L. Rev. 694.

30. Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119 (1936). As to the writ of prohibition see Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296 (1937). See, in this connection, Turrentine, "Restore Certiorari to Review State-Wide Administrative Bodies in California," (1941) 29 Calif. L. Rev. 275.

31. See the concurring opinion in Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425 (1943); Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457 (1942); Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848 (1939). Earlier decisions had held that these writs were unavailable where the administrative action involved in the particular case did not involve judicial functions, but no general restriction on the use of the writ with state-wide administrative agencies existed. See Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874 (1921); Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076 (1925).

32. Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349 (1942). The continued use of these writs with local administrative agencies is predicated upon the Legislature's power to create "inferior courts" in any city or county. See Laisne v. California State Board of Optometry, supra, note 31. Also, Elliott, "Certiorari and the Local Board" (1941) 29 Calif. L. Rev. 586.

33. See O'Brien v. Olson, 42 Cal. App.2d 8, 109 P.2d 8 (1941), in which the Governor was held to have exercised judicial functions for the purpose of the writ of review.

34. Homan v. Board of Dental Examiners, 202 Cal. 593, 262 P. 324 (1927); Garvin v. Chambers, 159 Cal. 212, 232 P. 696 (1924). (Cases are cited as to the scope of the writs of review and prohibition regardless of when they arose, on the theory that the recent judicial limitation on the availability of the writ in no way altered the nature of the relief given when the writ is available.)

its delegated powers, as those powers are defined by provisions of constitution or statute.[35]. Thus, errors, are correctible by the writs of review and prohibition where they are outside the limits of the agency's delegated powers, as for example, an error of law resulting in action outside the agency's jurisdiction[36]. or a finding made in the absence of any competent evidence to support it.[37]. Conversely, errors not amounting to excess of jurisdiction can not be reached by these writs[38]. and no right exists to introduce evidence outside of the record made before the agency in order to contradict the record.[39].

The writ of mandate. Jurisdiction to issue the writ of mandate is vested in the Supreme Court, the District Courts of Appeal and the Superior Courts.[40]. The details of procedure are regulated by statute and the writ is available where there is no other adequate remedy to compel the performance of an act which the law specially enjoins or to compel the admission of a party to a right or office to which he is entitled and from which he is unlawfully excluded.[41]. Provision is made for a jury trial upon essential questions of fact in the discretion of the court issuing the writ.[42].

Until recent years the writ of mandate was not widely used in this state as a means of challenging administrative action for it was limited to situations in which a ministerial officer had refused to perform duties specifically required of him by law.[43]. Where

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35. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942 (1941); Redlands High, etc. District v. Superior Court, 20 Cal.2d 348, 125 P.2d 467 (1942).

36. Jameson v. State Board of Dental Examiners, 118 Cal. App. 105, 5 P.2d 47 (1931).

37. Garvin V. Chambers, 159 Cal. 212, 232 P. 696 (1924); Renwick v. Phillips, 204 Cal. 349, 268 P. 368 (1928); Osborne v. Baughman, 85 Cal. App. 224, 259 P. 70 (1927).

38. Homan v. Board of Dental Examiners, supra, note 34, (defective pleading); Fuller v. Board of Medical Examiners, 14 Cal. App.2d 734, 59 P.2d 171 (1936) (weight of the evidence); Winning v. Board of Dental Examiners, 114 Cal. App. 658, 300 P. 866 (1931) (bias of agency member); Pacific Home Building Realty Co. v. Daugherty, 75 Cal. App. 623, 243 P. 473 (1925) (error of commissioner not amounting to excess of jurisdiction); nor has the court any power to modify the penalty imposed: Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67 (1932); Fuller v. Board of Medical Examiners, supra.

39. Thus, where the record showed the presence of a quorum, it would not be proper on a writ of review to receive evidence upon the issue of whether a quorum had in fact been present. See Jordan v. Alderson, 48 Cal. App. 547, 192 P. 170 (1920); Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625 (1918).

40. Constitution, Art. VI, secs. 4, 4b, 5.

41. Code Civ. Proc., secs. 1084-1097.

42. Code Civ. Proc., sec. 1090.

43. Bodinson Mfg. Co. v. Calif. Employment Commission, 17 Cal.2d 321, 109 P.2d 935 (1941).

discretion, either quasi-legislative or quasi-judicial in nature, had been vested in the administrative officer, the writ could not be used as a means of controlling the exercise of that discretion.[44] Coincidental with the restrictions which were placed by the courts upon the use of the writs of review and prohibition, however, the use of the writ of mandate for the purpose of reviewing administrative action was greatly expanded in California.[45] The nature and precise limits of this expanded use of the writ are not clear. This is a new remedy provided by judicial decision, and the courts have had a relatively short time within which to define the new use for the writ.[46]

Relying upon the cases decided since 1939, certain conclusions can be reached concerning the availability of the writ of mandate as a procedure for reviewing administrative action in California. The courts have given no indication that the writ of mandate is available where quasi-legislative administrative action is involved.[47] The writ is available, however, to correct abuse of discretion on the part of an administrative agency where the action involved is quasi-judicial in nature.[48] This is true whether the power is the

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44. Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784 (1927); Inglin v. Hoppin, 156 Cal. 483, 105 P. 582 (1909).

45. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848 (1939); Bodinson Mfg. Co. v. Calif. Employment Commission, supra, note 43.

46. The first case in this line is Drummey v. State Board of Funeral Directors, supra, note 45, decided in 1939. It should be noted, also, that a sharp split has existed on the Supreme Court of California since 1941. Three of the court's seven members deny that the writ of mandate is an appropriate remedy for this purpose, and the decisions outlining the conditions for its use are consequently 4 - 3 decisions.

    On this problem see: Bianchi, "The Case Against S.C.A. Number 8," (1942) 17 Calif. State Bar J. 172; Browne, "Proposition 16 should be Defeated," (1942) 17 Calif. State Bar J. 184; McGovney, "Administrative Decisions and Court Review Thereof, in California," (1941) 29 Calif. L. Rev. 110; Turrentine, "The Laisne Case--A Strange Chapter in our State Jurisprudence," (1942) 17 Calif. State Bar J. 165.

47. This result follows naturally from the fact that the writ of mandate will not be granted where another speedy and adequate remedy is available. The remedy of injunction is used in such situations, and there has been no need to resort to the extraordinary remedy of mandate.

48. The use of the term "quasi-judicial power" in this connection requires some explanation. Throughout this discussion of the methods for judicial review, the term "quasi-judicial" has been used in its ordinary connotation, that is, denoting the exercise of adjudicating functions by administrative agencies. The

limited quasi-judicial power of state-wide administrative agencies,[49] or the normal quasi-judicial power of local administrative agencies.[50] The remedy is not available as of right, however, and the court to which application is made has a discretionary power to grant or deny the writ.[51]

The scope of review where administrative action is challenged by the writ of mandate may be stated generally to consist of the correction of abuse of discretion.[52] This traditional definition of the purpose of the writ has been carried into the more recent cases, but it does not furnish an adequate standard for determining when courts will interfere with administrative action until it is annotated by reference to the court decisions. If an error of law is involved, for example, where an agency is acting beyond the powers delegated to it or where it is not complying with the requirements of the statute under which it operates, judicial review by

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test applied is an analytical one, and if the administrative action results in a decision concerning private rights based upon evidence taken at a hearing, the action is termed quasi-judicial.

One of the normal attributes of quasi-judicial administrative power is finality of determinations of fact where there is substantial evidence to support such a determination. Local administrative agencies in California still possess this power, but under the California Constitution state-wide agencies can not be given such power. (Laisne v. Calif. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457 (1942).) In this discussion it has been decided to apply the term "quasi-judicial" to the exercise of adjudicating functions by either type of agency, but to indicate the limitation on the power of state-wide agencies by calling the adjudicating powers which they exercise a "limited quasi-judicial power."

49. Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425 (1943).

50. Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349 (1942), in which the petitioner sought a writ of review. The trial court, however, issued a writ of mandate and this procedure was sustained on the theory that both writs were available where the quasi-judicial action of local administrative agencies was involved. See concurring opinion in Naughton v. Retirement Board of San Francisco, 43 Cal. App.2d 254, 110 P.2d 714 (1941) in which it is suggested that the scope of review is the same with both writs in this situation.

51. Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304 (1943).

52. Sipper v. Urban, supra, note 49.

writ of mandate will invalidate the administrative action.[53] Where the fact-finding power is involved, the review by mandate will correct an "abuse of discretion on the facts."[54] If the normal quasi-judicial power of a local administrative agency is challenged, this abuse of discretion on the facts exists only if the finding is not supported by substantial evidence, and where the evidence is conflicting the administrative determination will be sustained.[55] If the limited quasi-judicial power of a state-wide agency is involved, however, the courts on a review by mandate are authorized to exercise an independent judgment on the facts and to make their own findings.[56] In exercising this judgment the courts must give effect to a presumption in favor of the agency's action although the exact effect of this presumption is impossible to estimate.[57] In exercising its independent judgment, the court is authorized, under certain conditions, to accept evidence in addition to that which was presented before the agency[58] and it has been held in at least one case that no prejudicial error resulted where the court refused to consider the transcript of oral evidence taken before the agency and reached its independent conclusion upon evidence taken before

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53. Olive Proration Program, etc. v. Agricultural Prorate Commission, 17 Cal.2d 304, 109 P.2d 918 (1941); Bodinson Mfg. Co. v. Calif. Employment Commission, 17 Cal.2d 321, 109 P.2d 935 (1941).

54. See concurring opinion by Schauer, J. in Sipper v. Urban, supra, note 49.

55. Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349 (1942); Vaughn v. Board of Police Commissioners, 59 Cal. App.2d 771, 140 P.2d 130 (1943); Brant v. Retirement Board of San Francisco, 57 Cal. App.2d 721, 135 P.2d 396 (1943); Murphy v. Retirement Board, 49 Cal. App.2d 58, 121 P.2d 101 (1942); Dierssen v. Civil Service Commission, 43 Cal. App.2d 53, 110 P.2d 88 (1941).

56. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848 (1939); Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457 (1942). It should be noted in this regard that the more recent cases in this line have not used the language of compulsion but have said that the courts "may" exercise an independent judgment on the facts. This discretionary aspect of the trial court's review power on mandate is strongly emphasized in the later cases. See Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425 (1943); Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304 (1943).

57. See Drummey, Dare and Sipper cases, supra, note 56. This presumption based upon the provisions of Code Civ. Proc., sec. 1963 (15), is that official duties have been regularly performed. It has the effect of an admonition to the court and of casting the burden of proof upon the person seeking to overthrow the administrative action.

58. See Dare v. Board of Medical Examiners, supra, note 56.

the court.[59]. The extent of the court's power to take evidence in addition to that presented before the agency has varied from case to case in recent years,[60]. and some differences still exist as indicated by recent District Court of Appeal decisions[61]. and concurring and dissenting opinions in Supreme Court cases.[62].

The procedure which is to be followed upon judicial review of administrative action by the writ of mandate is equally uncertain. Where the normal quasi-judicial power of local agencies is concerned, the remedy is a parallel for the writ of review and it would seem that the record of the administrative agency's action is essential to the court's determination. Where the limited quasi-judicial power of a state-wide agency is involved, the record of proceedings before the board is ordinarily essential,[63]. but not indispensable,[64]. to the court's action. Under both types of administrative action the actual practice differs, so that the transcript of proceedings before the board is sometimes attached as part of the petitioner's pleading, sometimes attached to the respondent's return to the writ, and sometimes introduced in evidence at the court hearing. It has been indicated that the respondent board should normally attach the record as part of its return or have it available at the trial for the use of the court.[65]. Where the petitioner attaches a copy of the transcript to his petition, it has been held that the court may exercise its discretionary power to deny the issuance of the writ upon the theory that the petition plus the transcript shows that petitioner has no cause of action.[66]. The courts apparently are in some confusion on this point, however, because despite the fact that such cases are decided upon a pleading point (by sustaining a general demurrer for failure to state a cause of action), the courts frequently decide that the evidence in the transcript is sufficient

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59. Russell v. Miller, 21 Cal.2d 817, 136 P.2d 318 (1943).

60. The Drummey case, supra, note 56, spoke of an independent judgment on the facts without discussing the right to introduce new evidence. The Laisne case, supra, note 56, spoke of a trial de novo, apparently without limitation, while the Dare case, supra, note 56, attempted to prescribe definite conditions under which additional evidence could be introduced before the court and spoke of a qualified trial de novo.

61. See Wyatt v. Cerf, 64 Cal. App.2d ___ (64 A.C.A. 854), 140 P.2d 309 (1944). Compare Madruga v. Borden Co., 63 Cal. App.2d (63 A.C.A. 120), 146 P.2d 273 (1944).

62. See the Laisne case, supra, note 56, the Dare case, supra, note 56, the Russell case, supra, note 59, and the Sipper case, supra, note 56.

63. Dare v. Board of Medical Examiners, supra, note 56.

64. Russell v. Miller, supra, note 59.

65. Dare v. Board of Medical Examiners, supra, note 56.

66. Sipper v. Urban, supra, note 56; Zemansky v. Board of Police Commissioners, 61 Cal. App.2d 450, 143 P.2d 361 (1943); Vaughn v. Board of Police Commissioners, 59 Cal. App.2d 771, 140 P.2d 130 (1943); Newport v. Caminetti, 56 Cal. App.2d 557, 132 P.2d 897 (1943); Meyer v. Board of Public Works, 51 Cal. App.2d 456, 125 P.2d 50 (1942); Tobinsky v. Board of Medical Examiners, 49 Cal. App.2d 591, 121 P.2d 861 (1942); Hansen v. State Board of Equalization, 43 Cal. App.2d 176, 110 P.2d 453 (1941).

to support the board's action.[67] Conversely, however, it has been held that the allegations of a defective petition for mandate cannot be supplied by reference to the transcript of proceedings before the agency which is attached to the petition.[68]

Several other factors require mention. It has been well established in mandate proceedings that, although the court will invalidate an abuse of discretion where it is found, it will not attempt to direct or control the discretion vested in an administrative agency[69] and this principle has been followed since the expansion in the use of the writ.[70] A jury trial is obtainable in the discretion of the court, apparently,[71] and in that event there is some question as to what issues of fact may be submitted to the jury. They should not be the issues theretofore considered by the board in view of the rule that the court is not empowered to substitute its judgment for that of the agency. Under the independent judgment test, however, it might be held that a jury determination contrary to that reached by the board would demonstrate an abuse of its discretion but this issue is as yet undetermined by the courts.

Special statutory proceedings. In addition to the situations already mentioned in which the Legislature has attempted to designate one or more of the standard remedies as the means for reviewing the actions of particular agencies or has specified the scope of review, there are several situations in which it has attempted to create special proceedings for this purpose.

The Legislature has attempted in certain situations to provide for an "appeal" to the courts from the action of an administrative officer or board. Since the appellate jurisdiction of the courts is fixed by the Constitution, this type of provision is unconstitutional if it has the effect of altering that appellate jurisdiction.[72] Where the form of procedure is called an "appeal," however, it may still be held constitutional if the court determines that a wholly new proceeding in the court is contemplated and that no true

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67. See, with one judge dissenting on this point, Meyer v. Board of Public Works, 51 Cal. App.2d 456, 125 P.2d 50 (1942); Vaughn v. Board of Police Commissioners, 59 Cal. App.2d 771, 140 P.2d 130 (1943); Tobinsky v. Board of Medical Examiners, 49 Cal. App.2d 591, 121 P.2d 861 (1942).

68. Dierssen v. Civil Service Commission, 43 Cal. App.2d 53, 110 P.2d 88 (1941); Bennett v. Brady, 17 Cal. App.2d 114, 61 P.2d 530 (1936).

69. Inglin v. Hoppin, 156 Cal. 483, 105 P.2d 582 (1909); Doble Steam Motors Corporation v. Daugherty, 195 Cal. 158, 232 P. 140 (1924).

70. Bila v. Young, 30 Cal.2d 865, 129 P.2d 364 (1942); see Mosesian v. Parker, 44 Cal. App.2d 544, 112 P.2d 705 (1941).

71. Sparks v. Board of Dental Examiners, 25 Cal. App.2d 341, 77 P.2d 233 (1938).

72. Const., Art. VI, secs. 4, 4b, 5; Mojave River Irrigation District, 202 Cal. 717, 262 P. 724 (1928); Millsap v. Alderson, 63 Cal. App. 518, 219 P. 469 (1909). This constitutional requirement has been held to prevent the Legislature from prescribing an appeal from the action of a local board of supervisors, acting in a quasi-judicial capacity. Chinn v. Superior Court, 156 Cal. 478, 105 P. 580 (1909).

appeal is involved.[73]. Sometimes, in providing a special statutory form of action, the Legislature has called the proceeding a "review." Since the writ of review is provided in the Constitution, its historic function cannot be altered by a legislative provision attempting to apply it to bodies which do not exercise strictly judicial power. Thus, if the word "review" were construed to mean the writ of review, such legislation would be unconstitutional.[74]. Where, however, the court has concluded that the Legislature did not mean to specify the writ of review by its use of the word "review," the legislation has been sustained as a general statutory provision for judicial investigation into administrative action.[75].

In providing a special form of action the Legislature cannot create an original proceeding in the superior court where the effect is to impose non-judicial, administrative duties on the court or where the legislation applies to such a small class of persons that it constitutes special legislation.[76]. The prohibition against special legislation, if strictly interpreted would seem to prohibit any form of action limited to the orders of a particular administrative board, but several statutes of this nature have been enacted,[77]. and court decisions have sustained them, possibly because they include a broad enough class of persons to avoid the danger of constituting special legislation.

As indicated in the opening part of this section (Appendix, p. 93), the Legislature has played a relatively small part in prescribing procedures for the judicial review of administrative action. This reluctance to act is understandable, of course, in view of the numerous constitutional restrictions with which its power is circumscribed. Where the Legislature has been given full power to act, as with the Industrial Accident Commission and the Railroad Commission, more detailed provisions are found, but no attempt has been made to discuss these agencies or their procedure in this report.

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73. Collier & Wallis v. Astor, 9 Cal.2d 202, 70 P.2d 171 (1937).

74. Mojave River Irrigation District v. Superior Court, supra, note 72.

75. Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665 (1940); Agricultural Prorate Commission v. Superior Court, 31 Cal. App.2d 518, 88 P.2d 253 (1939).

76. Mojave River Irrigation District v. Superior Court, supra, note 72.

77. Alcoholic Beverage Control Act, Deering's Gen. Laws, Act 3796, sec. 46; Unemployment Insurance Act, Deering's Gen. Laws, Supp. 1939, Act 8780d, sec. 45.10; State Bar Act, Business & Prof. Code, sec. 6083.

See In re Shattuck, 208 Cal. 6, 279 P. 998 (1929); Louis Eckert Brewing Co. v. Unemployment Reserves Commission, 47 Cal. App.2d 844, 119 P.2d 227 (1941). In Bray v. Superior Court, 92 Cal. App. 428, 268 P. 374 (1928), the court reached the conclusion that the Water Commission Act (which had been involved in the Mojave case, supra, note 72) was not unconstitutional as special legislation in providing for an original action in the superior court by appropriators of water. The Bray case was approved in Wood v. Pendola, 1 Cal.2d 435, 35 P.2d 526 (1934).

Stay of execution. Code Civ. Proc., sec. 949, provides for an automatic stay of execution except in situations otherwise covered specifically. If an appeal is taken from a judgment granting mandate the appeal shall not act as a stay if petitioner can show that he will be damaged irreparably in his business or profession if the execution is stayed.[78]. If mandate is denied there is no such specific provision. A stay of execution, however, can operate only on a judgment which commands or permits some act to be done; if a judgment is effective by itself there is nothing to restrain.[79].

Supersedeas is an extraordinary writ issued by an appellate court to a lower court or officer thereof directing that execution or enforcement of a judgment be stayed pending appeal.[80]. The appellate court has inherent power to issue the writ, but the writ is an incident to and in aid of appellate jurisdiction.[81]. The writ issues in the discretion of the court and not as a matter of right.[82]. It has been held frequently that supersedeas, as well as statutory stay of execution, is inappropriate if the judgment is self-executing and requires no process for enforcement[83].Supersedeas is not available to keep an alternative writ of prohibition in force pending an appeal.[84].

There is some indication that the situations in which supersedeas may be issued are increasing, and that the courts are not entirely satisfied with the strict rules as they exist now. Prohibitory injunctions have long been held to be self-executing, and the courts in doubtful cases have held some injunctions to be mandatory in order to issue supersedeas. Recently a writ was issued in a case involving a prohibitory injunction.[85].

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78. Code Civ. Proc., sec. 1110b.

79. Boggs v. No. American Bond etc. Co., 6 Cal.2d 523, 58 P.2d 918 (1936); Wolf v. Gall, 174 Cal. 140, 162 P. 115 (1916).

80. Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161 (1932); In re Imperial Water Co., 199 Cal. 556, 250 P. 394 (1926); Southern Pac. Co. v. Superior Court, 167 Cal. 250, 139 P. 69 (1914).

81. McCann v. Union Bank, 4 Cal.2d 24, 47 P.2d 283 (1935); People v. Associated Oil Co., 211 Cal. 93, 294 P. 717 (1930).

82. Private Investors v. Homestake Min. Co., 11 Cal. App.2d 488, 54 P.2d 535 (1936).

83. Stewart v. Hurt, 9 Cal.2d 39, 68 P.2d 726 (1937); Hulse v. Davis, 200 Cal. 316, 253 P. 136 (1927); Tyler v. Presley, 72 Cal. 290, 13 P. 856 (1887) (appeal from judgment suspending attorney); Norton v. Municipal Court, 8 Cal. App.2d 368, 48 P.2d 124 (1935) (appeal from denial of writ of prohibition); People ex rel Boarts v. City of Westmoreland, 135 Cal. App. 517, 27 P.2d 394 (1933) (appeal in quo warranto proceeding); Erickson v. Municipal Court, 131 Cal. App. 327, 21 P.2d 480 (1933) (appeal from denial of certiorari); Lickley v. County Bd. of Education, 62 Cal. App. 527, 217 P. 133 (1923) (appeal from denial of writ of prohibition); In re Graves, 62 Cal. App. 168, 216 P. 386 (1923) (appeal from judgment suspending attorney). But see Painless Parker v. Bd. of Dental Examiners, 108 Cal. App. 156, 291 P. 431 (1930) which indicates in a dictum that the cases in which appeals were taken after a denial of certiorari are not controlled by the cases involving appeals after denial of prohibition, and that in the certiorari cases there might be something in the nature of a writ of execution which could be stayed.

84. Lickley v. County Bd. of Education, supra, note 83; Wood v. Bd. of Fire Com., 50 Cal. App. 594, 195 P. 739 (1920).

85. See Note, "Supersedeas: Use of the Writ to Stay Prohibitory Injunctions," (1942) 30 Calif. L. Rev. 209.

3. Comparative Legislation.

Parties entitled to review. A few of the statutes studied attempt to specify the parties entitled to review by providing that "any party aggrieved" or "adversely affected" by an administrative adjudication may seek court relief.[1]. So general a definition leaves the determination of proper parties to the courts,[2]. and is, therefore, futile.[3].

Form of action to obtain review. Some statutes allow appeals from administrative agencies directly to the courts in the same or in a similar manner as in civil actions.[4]. Other statutes merely codify the rights to the various remedies heretofore employed by providing that legal, equitable and declaratory relief are available as well as the remedies afforded by the extraordinary writs.[5]. Still other statutes provide that review may be had by a special statutory proceeding initiated by a petition in the manner of a petition for an extraordinary writ.[6]. In New York such legislation abolishes all the extraordinary writs except habeas corpus, thereby simplifying the law and facilitating relief. A similar proposal is incorporated in the Minn. Proposed Rev. Act; The Ill. Proposed Jud. Rev. Act provides that the petition allowed thereunder shall be the exclusive means of obtaining judicial review, but does not attempt to abolish the writs for all purposes. None of these acts purports to curtail the relief obtainable.[7].

The time within which relief must be sought whether by appeal or special proceeding varies from 15 days to 4 months, with the average being 30 days.

Courts and venue. All of the statutes studied provide that the relief may be sought in the lowest court of general jurisdiction. The venue is generally to be laid in a county where the respondent before the agency resided or did business, where the hearing was held or where the events complained of occurred.[8].

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1. A.B.A. Proposed Act, sec. 9(a); Model Act, sec. 11(1); N.D. Unif. Prac. Act, sec. 15; U.S. Sen. Bill 674, sec. 311(b).

2. Comment to A.B.A. Proposed Act (1944) 20 A.B.A.J. 44.

3. Atty. Gen. Rep., p. 85.

4. N.C. Revoc. of Licenses Act, sec. 150-4; N.D. Unif. Prac. Act, sec. 15; Ohio Unif. Proced. Act, sec. 154-73; Pa. Proposed Prac. Act, sec. 41.

5. A.B.A. Proposed Act, sec. 9(b); U.S. Sen. Bill 674, secs. 311 (a), (b).

6. Ill. Proposed Jud. Rev. Act, sec. 1; Minn. Proposed Review Act, sec. 1; Model Act, sec. 11; N.C. Proposed Unif. Proced. Act, sec. 9(b); N.Y. Civil Practice Act, sec. 1283 et ff.

7. On the character of the extraordinary writs as vestigial branches of common-law pleading and the procedural difficulties caused thereby see Third Annual Report of the Judicial Council of New York (1937) p. 129 et ff.

8. Pa. Proposed Prac. Act, sec. 41, provides that appeals are to be taken to the Court of Common Pleas of Dauphin County.

Reviewable orders. All of the statutes studied provide that only final orders are reviewable. The determination of what constitutes a final order is affected by the doctrine of exhaustion of administrative remedies. One of the statutes provides that no order shall be considered final if the right to a rehearing before the agency has not been exhausted.[9]. Another provides that review may not be sought until the time for rehearing has lapsed.[10]. Two statutes provide that no order shall be considered not to be final because of failure to request consideration by the agency.[11].

Interim relief. All of the statutes studied provide that the bringing of an action for judicial review shall not operate as an automatic stay of the administrative order, but that the court may order a stay if necessary to preserve the rights of the parties and upon such conditions or supersedeas bonds as the court considers adequate.

Scope of review. The scope of review is generally limited to the determination of whether the order of the agency is (1) in violation of constitutional provisions, (2) in excess of statutory authority or jurisdiction, (3) made on the basis of unlawful procedure, (4) affected by other error of law, (5) unsupported by substantial evidence on the entire record, (6) arbitrary or capricious.[12].

The principal discrepancies between the statutes are on the weight to be given to the findings of the agency. The most common test is that the findings of the agency are not to be disturbed if they are supported by "substantial evidence on the whole record."[13]. Other tests are that the findings are to be deemed "prima facie true";[14]. that they shall not be upset if supported by "sufficient evidence"[15]. or "reasonable and competent evidence"[16]. or merely "evidence."[17]. The N.Y. Civil Practice Act provides that all findings must be based on "competent evidence,"[18]. and must be set aside

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9. Ill. Proposed Jud. Rev. Act, sec. 1.

10. N.Y. Civil Practice Act, sec. 1285.

11. A.B.A. Proposed Act, sec. 9(d); U.S. Sen. Bill 674, sec. 311(d).

12. Model Act, sec. 12; see also A.B.A. Proposed Act, sec. 9f, adding a special provision for those cases where a trial de novo has been authorized by statute; Minn. Proposed Rev. Act, sec. 9; N.C. Proposed Unif. Proced. Act, sec. 9; N.D. Unif. Prac. Act, sec. 19; N.Y. Civil Practice Act, sec. 1296, adding special provisions to compel performance of duties enjoined by law in lieu of the writ of mandate; Pa. Proposed Prac. Act, sec. 44; U.S. Sen. Bill 674, sec. 311(e).

13. A.B.A. Proposed Act, sec. 9f (5); Model Act, sec. 12(5); Pa. Proposed Prac. Act, sec. 44; U.S. Sen. Bill 674, sec. 311(e)(5).

14. Ill. Proposed Jud. Rev. Act, sec. 10.

15. Minn. Proposed Review Act, sec. 9(5).

16. N.C. Proposed Unif. Proced. Act, sec. 9(b)(4).

17. N.D. Unif. Prac. Act, sec. 19.

18. Sec. 1296 (6).

if there was such a preponderance of proof against the facts found as to warrant setting aside the verdict of a jury affirming the facts.[19].

It is generally provided that the court in its review is confined to the record except that it may take evidence on irregularities of procedure not disclosed by the record.[20]. If a proper showing is made to the court as to the need for and propriety of allowing additional evidence the court may remand the case to the agency to take the evidence and make further findings.[21]. Only the Ohio Unif. Proced. Act provides that the court itself may take further evidence.[22].

Order by the court. Several of the statutes provide that the court may affirm, reverse or modify the agency decision[23]. but it is not clear whether this refers merely to the findings of fact or to the orders. The N.D. Unif. Prac. Act states that if the court modifies or reverses the decision, it shall remand the case to the agency for disposition.[24]. The Ill. Proposed Jud. Rev. Act, to the contrary, provides that the court shall "enter such order, determination or decision as is justified by law."[25].

4. Published Comment.

The Attorney General's Committee report stated that the main function of judicial review is to act as "a check against excess of power and abusive exercise of power in derogation of private right." Judicial review rarely is available to compel enforcement of law by administrators.[1]. Even when it is available, the effective use of judicial review is limited by the volume of adjudicated cases, the cost to the litigants, and the fact that many business transactions cannot wait until a review is decided. Judicial review, then, can be expected only to check and not to supplant administrative action. "Review must not be so expensive as to destroy the values --expertness, specialization and the like--which, as we have seen, were sought in the establishment of administrative agencies."[2].

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19. Sec. 1296 (7).

20. Ill. Proposed Jud. Rev. Act, sec. 10; Minn. Proposed Review Act, sec. 9(1). The N.C. Revoc. of Licenses Act, sec. 150-4 represents the anomalous procedure of allowing the licensee a "trial by jury of the issue of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the trial committee or counsel."

21. Ill. Proposed Jud. Rev. Act, sec. 11(f); Model Act, sec. 11(4); N.C. Proposed Unif. Proced. Act, sec. 9(b); N.D. Unif. Prac. Act, sec. 18.

22. Sec. 154-73.

23. Model Act, sec. 12; N.Y. Civil Practice Act, sec. 1300; Ohio Unif. Proced. Act, sec. 154-73; Pa. Proposed Prac. Act, sec. 44.

24. Sec. 19.

25. Sec. 10(g); see also sec. 10(h).

1. Atty. Gen. Rep., p. 76.

2. Id., at 77.

Many of the federal statutes are silent or vague on the subject of judicial review.[3]. And courts have enumerated only general standards which guide but do not compel, and leave considerable room for judgment. It has been established that generally only a person with legal standing can attack an administrative act, and review is not available in regard to preliminary or procedural matters.[4].

Assuming that a case is subject to some kind of review, Benjamin stated that: "Discussion of the problems involved and understanding of the judicial decisions, may be aided by distinguishing three types of quasi-judicial determinations--determinations of fact, determinations of law, and determinations as to the exercise of discretion. It is necessary at the same time to note that the precise lines of distinction are not always clear and that accurate classification in a given case may be impossible."[5]. As Benjamin also pointed out there is general agreement that questions of law are and should be fully reviewable by the courts.[6]. There is considerable difficulty, however, in determining whether a particular question will be reviewed as one of law or fact, and there is a further problem if the question is one of fact as to what test is to be applied.

Distinctions between law and fact are not always drawn clearly in the cases. Abstractly, there may be little confusion. One writer stated that "'Law' in its best accepted sense refers to precepts generally and uniformly applicable to all persons of like qualities and status and in like circumstances . . . On the other hand, when the law is capable of no further definition, the question whether the facts of the particular case meet the legal norm is a matter of fact and for the fact-finding agency."[7]. The courts, however, do not follow this test; frequently the question of whether administrative findings are sustained by substantial evidence is stated to be one of law.[8]. One proposed test is that in the administrative law field courts, on judicial review, should consider the problems concerning which they are expert, and that technical problems in the fields of the administrators should be left to the agencies. This approach seems to have gained a few adherents, but it is as difficult to draw a line on the basis of expertness as on the old distinction between law and fact, and it is doubtful that this new theory has many advantages over the older and better established concepts.[9].

In any event the distinction between fact and law is one that will be made by the courts, and not the legislatures. Of more immediate interest is the scope of review of a fact question. At one end of the scale of possibilities is the complete retrial of all the issues by a court, or a complete reweighing of the evidence by a

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3. Id., at 83.

4. Id., at 84-85.

5. Benj. Rep., p. 327.

6. Id., at 347.

7. Brown, "Fact and Law in Judicial Review" (1943) 56 Harv. L. Rev. 899, 904.

8. Id., at 902-903. See also Atty. Gen. Rep., p. 88.

9. Id., at 921-927. The theory discussed by Brown was advanced by Dean Landis.

court. One writer stated: "The American Bar Association Committee on Administrative Law started off with this [independent judicial review on the facts] as a cardinal principle. As it continued its work the principle was gradually diluted until all that remained in the final draft of the Logan-Walter Bill was a direction to set aside an order if the findings of fact were 'clearly erroneous'; and even this remnant had to be removed before the Senate would pass the bill. Judicial review on the facts can be effectively procured in only one way--by real trials de novo in the courts. No one wants that because it means in the end, having a whole new set of courts to duplicate the administrators."[10]. Benjamin criticized any review which would substitute the judgment of the court on the evidence for that of the agency.[11]. The Attorney General's Committee concluded that an inquiry as to whether administrative findings are supported by the weight of the evidence would be desirable in few if any cases, and stated the following reasons: "[1] there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. . . . [2] If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. This would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications."[12].

In a limited number of fact situations the United States Supreme Court has prescribed an independent judgment on the facts. The present extent of this rule is not clear.[13]. "Beyond the cases to which these decisions are applicable, judicial review may be restricted to the record before the agency, and the extent of the courts' scrutiny may be narrowed. To state the matter very broadly judicial review is generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are said to be matters of administrative judgment to be determined exclusively by the agency."[14]. The test generally applied in the federal cases is whether the finding is supported by substantial evidence.[15]. Benjamin stated that in New York the substantial evidence test has been applied uniformly by the courts whatever the language of the particular review statute.[16].

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10. Feller, "Administrative Law Investigation Comes of Age" (1941) 41 Col. L. Rev. 589, 605.

11. Benj. Rep., pp. 336-338.

12. Atty. Gen. Rep., pp. 91-92.

13. See Atty. Gen. Rep., p. 87; Benj. Rep., pp. 343-344. No attempt has been made herein to summarize the published comment in California with respect to the current California doctrine concerning independent judgment on the facts. (Appendix, p. 102.) These articles, which are too well known to require summarization, are cited above. (Appendix, pp. 98, 100.)

14. Atty. Gen. Rep., p. 87.

15. Id., at 88.

16. Benj. Rep., p. 328.

Substantial evidence is not easy to define. Benjamin quoted a New York case stating that "choice lies with the Board and its finding is supported by the evidence and is conclusive when others might reasonably make the same choice,"[17]. and he concluded that the substantial evidence test "is thus a test of the rationality of a quasi-judicial determination, taking into account all the evidence on both sides."[18]. He proposed this amendment to the New York Practice Act: The court is to decide "Whether, under the entire record of the hearing, each of the findings of fact necessary to support the determination is itself supported by substantial evidence.'"[19]. The Attorney General's Committee stated that the substantial evidence test of the Supreme Court required such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[20]. Stason has considered the meaning of substantial evidence in a long article, and his definition is this: "the term 'substantial evidence' should be construed to confer finality upon an administrative decision on the facts when upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside. In effect this is the prevailing rule in jury trials relative to the direction of verdicts, and is also the prevailing rule applied by appellate courts in setting aside jury verdicts because contrary to the evidence."[21]. This is only one of the possible definitions of substantial evidence, however. Many court opinions have indicated that rules applicable to directed verdicts and new trials are used; sometimes the evidence on one side is not set off against opposing evidence. The general tendency of the federal courts is to require more than a scintilla of testimony on one side and no consideration of the whole record, but to require much less than a weighing of the evidence. Stason concluded that the analogy to directed verdicts and new trials ordered by appellate courts results in a standard which will neither hamper administrative efficiency nor overload the courts, and that there is much to gain from simplification of concepts and from taking advantage of the established practices in the related fields.[22].

Other tests for the review of facts have been criticized. The Attorney General's Committee stated that provisions to the effect that clearly or plainly erroneous findings, or findings not supported by credible evidence, be set aside are without specific content, and there is no general understanding as to their meaning.[23]. Benjamin stated that review should not be more limited than that provided under a substantial evidence test because that test "affords a means of correcting abuses in individual cases and because the

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17. Matter of Stork Restaurant, Inc. v. Boland, 282 N.Y. 256, 274 (1940).

18. Benj. Rep., p. 329.

19. Id., at 339.

20. Atty. Gen. Rep., pp. 92, 89-90.

21. Stason, "'Substantial Evidence' in Administrative Law" (1941) 89 U. of Pa. L. Rev. 1026, 1038.

22. Id., at 1039-1051.

23. Atty. Gen. Rep., p. 92.

cautionary effect of the prospect of such review should help to assure proper administrative adjudication in the first instance.[24].

Separate from the determination by a court of issues of law and fact is the problem of review of administrative determinations as to the exercise of discretion. In New York "The test which the courts ordinarily apply in reviewing quasi-judicial determinations as to the abuse of discretion is thus--like the substantial evidence test--a test of the rationality of the determination; and this is, I think, as a matter of policy, the right test to apply in all but special instances where administrative discretion may be unreviewable . . . In exceptional instances, where the special nature of the subject-matter of adjudication leads to the conclusion that the particular discretion vested in the administrative tribunal is intended to be absolute, the exercise of discretion may, indeed, properly be held to be unreviewable." Questions of discretion "are even more clearly within the special competence of administrative tribunals" than questions of fact.[25]. The Attorney General's Committee stated that "There is a category of cases in which judicial review is denied because it is thought that the cases deal with matters which are more fittingly lodged in the exclusive discretion of the administrative branch, subject to controls other than judicial review. This category . . . is the product chiefly of judicial self limitation."[26].

There are many methods for questioning administrative action in the courts. The Attorney General's Committee lists private actions at law, equity injunction (which is characterized as the common remedy in the federal courts and the United States generally), habeas corpus, certiorari, mandamus, prohibition, declaratory judgments and various types of special statutory review.[27]. Benjamin discusses a variety of procedures available in New York;[28]. these proceedings in the nature of mandate generally are used "to review an administrative determination arrived at otherwise than as the result of a prescribed quasi-judicial hearing."[29]. In New York the substitution of one general writ for the remedies of certiorari, prohibition and mandamus is now provided for (see Appendix, p. 106). This was recommended first in a Judicial Council Report.[30]. In Illinois, appeal, mandamus, certiorari and injunction are used.[31]. Occasionally provision is made for review in the first instance by a court other than a trial court. For example, some federal statutes provide for "(1) review by a three-judge district court convoked for that purpose; or (2) review in a circuit court of appeals."[32].

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24. Benj. Rep., p. 338.

25. Benj. Rep., p. 346.

26. Atty. Gen. Rep., p. 86.

27. Id., at 81-83.

28. Benj. Rep., pp. 350-368.

29. Id., at 351.

30. Third Annual Report of the Judicial Council of New York (1937), pp. 129-198.

31. Note, "Occupational Licensing in Illinois" (1942) 9 U. of Chi. L. Rev. 694, 711-715.

32. Atty. Gen. Rep., p. 93. See generally pp. 92-95.

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE AGENCIES SURVEY

Tentative Draft of Statutes and Constitutional Amendment and Comment Thereon

Part 1. Administrative Procedure Act.

Part 2. Act creating a Department of Administrative Agencies.

Part 3. Procedure for judicial review by mandamus.

Part 4. Constitutional amendment authorizing a unified procedure for mandamus, certiorari and prohibition.

Committee on Administrative Agencies Survey
304 State Building
San Francisco, 3, California

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE AGENCIES SURVEY

Part 1.

Administrative Procedure Act

The proposed Administrative Procedure Act as now drafted applies to formal disciplinary proceedings brought by administrative licensing agencies which are subject to the direct control of the Legislature. It can easily be made applicable to similar proceedings conducted by such agencies to determine questions of fact before issuing licenses or permits. This Act will provide a uniform procedure in place of the diverse practices now used by the various licensing agencies. A full investigation of all the state agencies has not yet been completed, so an accurate list of the agencies which will operate under the Act can not be compiled at this time.*

It is proposed that the Act be made Title 10A of the Code of Civil Procedure which will commence with section 1300, and that the Act be incorporated by reference in the statutes dealing with each individual agency. The Code of Civil Procedure seems the most appropriate place for the Act itself because the procedure involved is analogous to the trial of civil cases, and because the agencies which will use the procedure are scattered throughout the codes and general laws.

A definitions section of the Act will be drafted prior to its submission to the Legislature, but none is included herein because the definitions cannot be stated accurately until a determination of the precise coverage of the Act is made.

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*For a summary of the extent to which the various agencies have been studied so far, see Appendix, pp. iii-iv. The Industrial Accident Commission and the Railroad Commission were excluded from the survey because their constitutional status puts them in a special category.

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ADMINISTRATIVE PROCEDURE ACT

JUDICIAL COUNCIL OF CALIFORNIA

ADMINISTRATIVE AGENCIES SURVEY

Part 3.

Procedure for Judicial Review by Mandamus

This proposed amendment to the Code of Civil Procedure sets forth the procedure by which a review by mandate may be had after a formal, adjudicatory decision by any administrative agency. It may be used in cases where a hearing was not conducted under the Administrative Procedure Act as well as in cases under the Act.

An act to add Section 1094.5 to the Code of Civil Procedure, relating to the judicial review of administrative decisions.

The people of the State of California do enact as follows:

Section 1. Section 1094.5 is added to the Code of Civil Procedure, to read:

1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision affecting rights of person or property, made as the result of a proceeding in which a hearing is required to be given, evidence is required to be taken and discretion is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the discretion conferred upon the respondent has not been exercised in the manner required by law; the order or decision is not supported by the findings; or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence: in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the evidence is not sufficient to support the findings made

by respondent; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, for good cause, was not produced or was improperly excluded at the hearing before respondent, it may enter judgment as provided in subsection (e) of this section remanding the case to be reconsidered in the light of such evidence; and, in addition, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion vested in the respondent.

(f) The court in which proceedings under this section are instituted may restrain the operation of the administrative order or decision pending the judgment of the court, but if an appeal is taken from a denial of the writ, the judgment shall not be stayed except upon the order of the court to which such appeal is taken.

Comment.

The purpose of this proposed amendment to the Code of Civil Procedure is to clarify the review procedure which has been created by the decisions of the Supreme Court. One of the strongest arguments in support of such a proposal is contained in the concurring opinion in Sipper v. Urban, in which Justice Schauer says,

> "As to the legislative constitutional problem previously mentioned, [the Constitution] . . . does not preclude it from setting up a form or forms of procedure in

the nature of the mandamus review which has been developed. So long as it does not add to or subtract from the courts' constitutional powers, express or inherent, it may prescribe regulations which would constitute a guide for the public, the administrative officers, and the courts. It should not be necessary for this court to have to improvise rules of procedure for review of the decisions of any of the several boards of the State, as is trenched upon in the Dare case, yet the need for such rules is patent. It seems highly probably that many of the seemingly arbitrary practices of such agencies and many of the claims of injustice to individuals would be obviated if there were legislatively established standards and plans of procedure governing both the initial proceedings and the review thereof, known alike to the courts and boards and known by or available to the public. Not the least of the beneficiaries of such legislation would be the boards and officers themselves, most of whom are striving diligently and conscientiously to serve the public despite the uncertainties of the procedures which they have attempted to follow and to which they have been subjected."*

Lines 1-6: These lines are intended to describe in general language the type of quasi-judicial action which is the subject of the Council's investigation, and is not intended to cover the judicial review of quasi-legislative action. A specific procedure for a specific purpose is proposed here.

Line 7: The provision that the case be heard without a jury is included because a full hearing has been held and a transcript of that proceeding is available. There is no constitutional right to a trial by jury in such cases because a special proceeding is involved, and Code of Civ. Proc., sec. 1090, merely gives the judge a discretionary right to call in a jury.

Lines 7-13: The record of the proceedings before the board may be filed by either side or may be requested by the court. Since the burden rests upon the petitioner to show abuse of discretion, he should ordinarily show it on the basis of the record before the board. The problem of cost is taken care of by the provision that if the petitioner pays for the record filed with the court and if he is successful in the action, he may recover the expense as costs.

Lines 14-21: This subsection specifies the questions presented on review by mandate. They are consistent with the language of the Supreme Court opinions and are a revised statement of the questions stated in most of the recent statutes proposed by other studies, including that of the American Bar Association.

Lines 22-30: This subsection is a definition of "abuse of discretion" as it relates to the problem of adequacy of the evidence to support an administrative finding of fact. The provision is necessarily dual in nature, covering both the situation in which the court exercises an independent judgment on the facts and the situation in which the court merely investigates to ascertain whether there is substantial evidence to support the administrative determination of fact. This is essential in view of the fact that both types of review are available on mandate.

Lines 31-38: This provision also is dual in nature, and authorizes the court to send a case back for reconsideration in the light of additional evidence. In the cases where the independent

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*22 Cal.2d 138, 151, 137 P.2d 425, 431 (1943).

judgment rule is applicable this provision gives a discretion to the court to take additional evidence itself.

Lines 39-45: The last subsection provides for the judgment which the court should enter in the mandate action. This language makes explicit what is implicit in the mandate cases, that is, that the court should limit its function to setting aside action which constitutes an abuse of discretion, or to ordering specific action only where no discretionary power still remains in the board.

Lines 46-48: The present practice is restated. The superior court can stay the operation of the agency determination by an order accompanying the alternative writ.

Lines 48-51: This clause will apply only where a writ of mandate is denied. If the writ is granted Code Civ. Proc., sec. 1110b, already covers the matter of stay. If the writ is denied the present case law indicates that the judgment will be considered self-executing and that neither a statutory stay nor supersedeas may issue. There seems, however, to be some indication of a trend toward increasing the situations where supersedeas is available, and because of the nature of the interests involved, it is conceivable that the courts might hold that supersedeas is available. In that event it is possible that the judgment might be subject to automatic statutory stay under Code Civ. Proc., sec. 949. This would be undesirable because a petitioner who has lost his case before the agency and before the superior court should not be entitled to an automatic stay merely because he takes an appeal. In some cases, however, a stay may be appropriate, and then it should be granted only in the discretion of the reviewing court.

STATUTES OF CALIFORNIA

FIFTY-SIXTH SESSION OF THE LEGISLATURE

1945

BEGAN ON MONDAY, JANUARY EIGHTH, AND
ADJOURNED SATURDAY, JUNE SIXTEENTH,
NINETEEN HUNDRED FORTY-FIVE

CHAPTER 868

An act to add Section 1094.5 to the Code of Civil Procedure, relating to the judicial review of administrative decisions.

In effect September 15, 1945

[Approved by Governor June 15, 1945. Filed with Secretary of State June 15, 1945.]

The people of the State of California do enact as follows:

SECTION 1. Section 1094.5 is added to the Code of Civil Procedure, to read:

Court review of administrative orders

1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

Jurisdiction

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

Abuse of discretion

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

Relevant evidence

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

Judgment

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case

in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

Stay of order or decision

(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.

CHAPTER 869

An act to amend Section 102 of, and to add Sections 110.5 and 110.6 to, the Business and Professions Code, relating to the divisions, boards and bureaus of the Department of Professional and Vocational Standards, and relating to the employment of hearing officers and the continued study of administrative procedure.

[Approved by Governor June 15, 1945. Filed with Secretary of State June 15, 1945.]

In effect September 15, 1945

The people of the State of California do enact as follows:

SECTION 1. Section 102 of said code is amended to read:

Administration of board created by initiative act, etc.

102. Upon the request of any board regulating, licensing, or controlling any professional or vocational occupation created by an initiative act, the Director of Professional and Vocational Standards may take over the duties of the board under the same conditions and in the same manner as provided in this code for other boards of like character. Such boards shall pay a proportionate cost of the administration of the department on the same basis as is charged other boards included within the department. Upon request from any such board which has adopted the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code as rules of procedure in proceedings before it, the director shall assign hearing officers for such proceedings in accordance with Section 110.5.

FRED B. WOOD
LEGISLATIVE COUNSEL

JOSEPH W. PAULUCCI
CHIEF DEPUTY

LAWRENCE G. ALLYN
HARRIETT R. BUHLER
ARTHUR F. COE
JOSEPH L. KNOWLES
VIRGINIA STEPHENS
J. D. STRAUSS
ARTHUR P. WILL
DEPUTIES

STATE OF CALIFORNIA

Office of Legislative Counsel

220 STATE CAPITOL, SACRAMENTO 2
995 MARKET STREET, SAN FRANCISCO 3
108 STATE BUILDING, LOS ANGELES 12

June 9, 1945

REPORT ON SENATE BILL NO. 736. DeLAP, KUCHEL, JESPERSEN, MAYO, COLLIER, QUINN, KEATING, BREED, DESMOND, DORSEY, SALSMAN, CRITTENDEN, RICH, and SHELLEY.

SUBJECT: Adds Section 1094.5 to the Code of Civil Procedure, relating to judicial review of administrative procedure.

FORM: Approved. TITLE: Approved.

CONSTITUTIONALITY: Approved.

ANALYSIS: (a) Provides for review of final administrative order or decision by writ of mandate, to be heard by court without a jury.

Provides for filing all or part of record with respondent's points and authorities, or upon order of court. Expenses of preparing record to be taxable as costs.

(b) Limits inquiry to questions of whether: (1) respondent has proceeded without or in excess of jurisdiction, (2) there was a fair trial, (3) there was prejudicial abuse of discretion.

Provides that abuse of discretion is established if respondent has not proceeded as required by law, the order is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that findings are not supported by the evidence, the court may use its independent judgment as to weight of evidence. In all other cases, abuse of discretion is established if the court determines the findings are not supported by substantial evidence.

(d) Provides that court may direct that evidence which could not be produced at hearing or which was improperly excluded be considered, or in proper cases the court may consider such evidence.

(e) Directs court to enter judgment either commanding respondent to set aside order or denying the writ, and may direct reconsideration, but may not limit or control discretion vested in agency.

(f) Provides that court may stay operation of order pending judgment. On appeal from denial of writ, appellate court may make order for stay. On appeal from granting of writ, order is stayed, unless appellate court orders otherwise.

Provides that determination of validity of order shall not become moot because of completion of penalty during pendency of proceedings.

COMMENT: This bill (S. B. 736) does not conflict with, and is independent of, S. B. 705, prescribing an administrative procedure for State agencies, now before you for consideration. Either bill would be operative without the approval of the other.

Fred B. Wood

Fred B. Wood
Legislative Counsel

JLK:cm

STATE OF CALIFORNIA
SAN FRANCISCO 2

Inter-Departmental Communication

To: Honorable Earl Warren
Governor of California
State Capitol
Sacramento, California

File No.

Date: June 7, 1945

Subject:
Senate Bill 736

From: Department of Justice
J. Albert Hutchinson

Adds section 1094.5 to the Code of Civil Procedure as a part of the chapter on writs of mandate to provide judicial review of administrative decisions.

Constitutional Considerations:

It is the opinion of this office that in a case properly presented the Supreme Court of this State as presently constituted will declare this bill constitutional in all respects.

Policy Considerations:

This bill is designed to and will have the effect of clarifying the judicial proceedings brought to review administrative factual determinations. At the present time this subject is almost hopelessly confused and the Courts, as well as the administrative agencies and attorneys practicing in this field seem practically hopeless of finding a solution within any measurable time. The adoption of this amendment to the Code of Civil Procedure will settle many such problems as the admissibility and the mode of securing the admission of the administrative record, the situations in which the administrative action will be sustained by substantial evidence, and, a most important consideration, will permit the Court to remand administrative proceedings for further consideration by the administrative agency in cases where relevant evidence was not available or was wrongfully excluded from the administrative hearings so that the administrative agency, rather than the court, may finally determine the whole proceeding and the court may in turn actually review the administrative action. The latter consideration accords both to the administrative agency and the reviewing court their primary functions and the opportunity of carrying out the legislative intent in authorizing the administrative agency to conduct and determine its own proceedings.

This proposed amendment will not, of course, solve many of the most trying problems of judicial review, but any further attempt in this direction might be held unconstitutional in view of the holding of the Supreme Court in the case of Laisne v. State Board of Optometry, 19 Cal. (2d) 83 and other cases on this subject.

Another advantage of the proposed amendment is that the Court may in a proper case stay the operation of an administrative order pending its determination of the review proceedings when such stay is of public interest, but is prohibited from staying the administrative order where a writ is denied by the Court. Such a stay may, however, be accorded by the appellate court. The Court of Appeal may also stay the administrative order where the writ is granted by the trial court and an appeal is taken therefrom. These procedures are at the present time subject to much question and indecision. It is believed that the adoption of this amendment will go far toward the solution of problems of judicial review.

Detailed analysis:

Section 1094.5 of the Code of Civil Procedure provides judicial review and determination of validity of final administrative orders or decisions made in a proceeding in which the law requires a hearing, ~~the~~ the taking of evidence and vests discretion in the administrative agency in the determination of the facts.

Such cases shall be heard by the Court sitting without a jury.

All or part of the record of the administrative proceeding may be filed with the petition or by the respondent agency with its points and authorities or ordered filed by the Court. The prevailing party may recover the expense incurred by him in preparing all or part of said record.

In such court actions inquiry shall extend to the questions whether the respondent has proceeded without, or in excess of its jurisdiction; there was a fair trial; or there was a prejudicial abuse of discretion.

Abuse of discretion is established if the respondent has not proceeded according to law, the order or decision is not supported by the findings or the findings are not supported by the evidence.

Where the issue is evidentiary support for the findings, abuse of discretion is established, in cases where the Court is authorized by law to exercise an independent judgment on the evidence, if the Court determines that the administrative findings are not supported by the weight of the evidence, and, in other cases, if the Court finds that the administrative findings are not supported by substantial evidence in the light of the whole record.

Where the Court finds there is relevant evidence, which could not have been produced by due diligence, or where relevant evidence was improperly excluded, at the administrative hearing, the Court may remand the case to the respondent for reconsideration in the light of such evidence, or, in cases where the Court is authorized by law to exercise its independent judgment on the evidence, it may admit such evidence in its own hearing without remanding the case.

The judgment may (1) direct the respondent to set aside its order or decision, (2) deny the writ or (3) may direct that such order or decision be set aside and the matter be reconsidered in light of the judgment or further action especially enjoined by law be taken, but in the latter case the judgment may not control the discretion legally vested in the respondent.

The Court, in cases pending under the section, may stay the operation of the administrative order pending its judgment where the Court is satisfied the imposition or continuance of such stay is not against public interest. Where the writ is denied, the administrative order may not be stayed except by the appellate court.

If the writ is granted, the administrative order is stayed unless the appellate court orders otherwise.

Where a proceeding is commenced while the administrative order is in effect, the action does not become moot upon completion of administrative penalty ordered or upon compliance with the administrative order.

JAH:MD

AMENDED IN ASSEMBLY MAY 31, 1945

AMENDED IN ASSEMBLY MAY 28, 1945

SENATE BILL No. 736

INTRODUCED BY SENATORS DELAP, KUCHEL, JESPERSEN, MAYO, COLLIER, QUINN, KEATING, BREED, DESMOND, DORSEY, SALSMAN, CRITTENDEN, RICH, AND SHELLEY

January 25, 1945

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 1094.5 to the Code of Civil Procedure, relating to the judicial review of administrative decisions.

The people of the State of California do enact as follows:

SECTION 1. Section 1094.5 is added to the Code of Civil Procedure, to read:

1094.5. (a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. *Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings.*

O

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2022, I electronically filed the foregoing document titled **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF APPELLANT'S OPENING BRIEF ON THE MERITS; DECLARATION OF MICHAEL SHIPLEY** through the Court's electronic filing system.

Furthermore a copy of the document was mailed to the interested parties below:

David Arthur Urban
Liebert Cassidy Whitmore
401 West A Street, Suite 1675
San Diego, CA 92101

Suzanne Solomon
Liebert Cassidy Whitmore
135 Main St Fl 7
San Francisco, CA 94105-8111

Attorneys for Respondents

By: */s/ Michael J. Shipley*
Michael J. Shipley

KIRKLAND & ELLIS LLP

Attorneys for Petitioner and Appellant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **MEINHARDT v. CITY OF SUNNYVALE (SUNNYVALE DEPARTMENT OF PUBLIC SAFETY)**
Case Number: **S274147**
Lower Court Case Number: **D079451**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **jwalker@kirkland.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S274147-Petitioner-Opening Brief_
ADDITIONAL DOCUMENTS	S274147-Petitioner-Request for Judicial Notice with Exhibits_ke

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Gregg Adam Messing Adam & Jasmine LLP 203436	gregg@majlabor.com	e-Serve	8/30/2022 11:52:54 PM
Sabrina Venskus Venskus & Associates, A.P.C. 219153	rkimball@lawsv.com	e-Serve	8/30/2022 11:52:54 PM
Pro Per Attorney Nationwide Legal, LLC 54423	sfcourt@nationwideasap.com	e-Serve	8/30/2022 11:52:54 PM
Kelly Perigoe KING & SPALDING LLP 268872	kperigoe@kslaw.com	e-Serve	8/30/2022 11:52:54 PM
Janet Walker Kirkland and Ellis LLP	jwalker@kirkland.com	e-Serve	8/30/2022 11:52:54 PM
Suzanne Solomon Liebert Cassidy Whitmore 169005	ssolomon@lcwlegal.com	e-Serve	8/30/2022 11:52:54 PM
Michael Shipley Kirkland & Ellis LLP 233674	mshipley@kirkland.com	e-Serve	8/30/2022 11:52:54 PM
Julia Forgie NRDC 304701	jforgie@nrdc.org	e-Serve	8/30/2022 11:52:54 PM
David Urban Liebert Cassidy Whitmore	durban@lcwlegal.com	e-Serve	8/30/2022 11:52:54 PM

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/30/2022

Date

/s/Laura Bay

Signature

Walker, Janet (Other)

Last Name, First Name (PNum)

Kirkland and Ellis LLP

Law Firm