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JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY ACTIONS IN INDIANA

Traditionally, the right of appeal from decisions of administrative officials, boards or agencies is a matter of legislative discretion to be given or withheld as the legislature sees fit; there is no vested right of appeal.¹ The legislature may not only declare what questions may be tried or reviewed on appeal, to what tribunal the appeal may proceed and where the appeal shall stop, but it also may deny any appeal whatsoever.² Therefore, if no statutory procedure is provided, no review is available,³ unless the extraordinary prerogative writs⁴ are applicable. The use of the extraordinary writs as a method of review is highly complicated and often unsatisfactory.⁵ They are incomplete and overlapping, and taken

1. *Ruddick v. City of Columbus*, 183 Ind. 21, 108 N.E. 106 (1915) (proceeding through common council to extend or open certain streets); *Collins v. Laybold*, 182 Ind. 126, 104 N.E. 971 (1914) (drainage proceedings); *Bemis v. Guirl Drainage Co.*, 182 Ind. 36, 105 N.E. 496 (1914); *Stockton v. Yeoman*, 179 Ind. 61, 100 N.E. 2 (1913) (public highway improvement proceedings).

2. *Bemis v. Guirl Drainage Co.*, *supra* note 1.

3. *In re* Petition to Transfer Appeals, 202 Ind. 365, 174 N.E. 812 (1931); *State Board v. Ort*, 84 Ind. App. 260, 151 N.E. 31 (1925); *Cushman v. Hussey*, 187 Ind. 228, 118 N.E. 816 (1917); *Farley v. Hamilton Co.*, 126 Ind. 468, 26 N.E. 174 (1890); *Sims v. Monroe Co.*, 39 Ind. 40 (1872).

4. Mandamus: IND. ANN. STAT. § 3-2201-8808, (Burns 1946); Prohibition: IND. ANN. STAT. §3-2006-2007 (Burns 1946); Quo Warranto (Information): IND. ANN. STAT. § 3-2001-2004 (Burns 1946); Injunction: IND. ANN. STAT. § 3-2101-2120 (Burns 1946). Reference to the extraordinary writs is made at this point for background purposes only. For a complete historical background of the use of the various writs and a thorough discussion of their use and function in the field of judicial review, see Note, *Appellate Review by Extraordinary Writ in Indiana*, 33 IND. L. J. 431 (1958). See also, Fuchs, *Judicial Control of Administrative Agencies in Indiana*, I, 28 IND. L. J. 1, 17-27 (1952).

5. The use of extraordinary remedies as a means of judicial review has not escaped criticism. See DAVIS, ADMINISTRATIVE LAW § 24.01 (1958): "An imaginary system

together do not provide a complete code of judicial review. These writs are granted only in the discretion of the court after it first determines it has the jurisdiction to take the case; also they are not applicable if there are adequate statutory remedies available.⁶ These fine distinctions are often not brought home to the litigant until after an unsuccessful and time-consuming appeal from an adverse ruling on the writ proceeding.⁷

Statutory appeals, the litigant's only alternate method of review, may be equally restrictive. The courts will not accept review if they interpret the statute to give the decision of the agency a preclusive effect.⁸ Administrative decisions can be collaterally attacked by injunction only for want of jurisdiction.⁹ If a statutory method of review or appeal is provided, then the courts insist upon a strict and exclusive compliance with the statutory procedure.¹⁰ The general statutes relating to civil procedure cannot be resorted to for the purpose of extending or limiting the provisions of a statutory review.¹¹

THE WARREN HOLDING

Then in 1940 the Indiana Supreme Court in *Warren v. Indiana Bell Telephone Co.*¹² extended reviewability in a situation where a limited appeal had been provided by statute.¹³ The statute in question vested exclu-

cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies."

6. See Note, 33 IND. L. J. 431, 432-433 (1958).

7. *Supra* Note 6.

8. For a discussion of the constitutionality of an Act which makes no provision for an appeal from agency action see Note *Constitutional Law—Appeals From Administrative Tribunals*, 15 IND. L. J. 579 (1939-40). *Financial Aid Corp. v. Wallace*, 216 Ind. 114, 122, 23 N.E.2d 472 (1939): "Whether an act expressly provides an appeal is of no consequence. If an administrative officer undertakes to perform an unauthorized act, an action will lie in court enjoining, prohibiting or mandating him in the performance of administrative acts."

9. *City of Peru v. State ex rel. McGuire*, 210 Ind. 668, 199 N.E. 151 (1935); *Hyde v. Board of Comm'rs of Wells County*, 209 Ind. 245, 198 N.E. 333 (1935); *Peden v. Board of Review of Cass County*, 208 Ind. 215, 195 N.E. 87 (1935); *Felthoff v. Richards*, 203 Ind. 637, 180 N.E. 596 (1932); *In re Northwestern Indiana Tel. Co.*, 201 Ind. 667, 171 N.E. 65 (1930).

10. *Board of Comm'rs of Marion County v. Steele*, 103 Ind. App. 51, 5 N.E.2d 135 (1936) (proceedings under drainage act).

11. *Id.* at 54. Partly responsible for this rigid and narrow viewpoint was the fact that the term "decision" as used in the civil procedure statutes providing for appeals was held to refer only to judicial decisions, meaning decisions involving a judicial act and not purely ministerial decisions or administrative acts. *Ross v. Becker*, 169 Ind. 166, 81 N.E. 478 (1907); *In re Northwestern Indiana Tel. Co.*, 201 Ind. 667, 171 N.E. 65 (1930); *Collins v. Laybold*, 182 Ind. 126, 104 N.E. 971 (1914); *Potts v. Bennett*, 140 Ind. 71, 39 N.E. 518 (1895).

12. 217 Ind. 93, 26 N.E.2d 399 (1940) (workmen's compensation case originating before Industrial Board of Indiana).

13. IND. ANN. STAT. § 40-1512 (Burns 1933): "An award by the full [industrial] board shall be conclusive and binding as to all questions of fact, but either party to the dispute may, within thirty (30) days from the date of such award, appeal to the Appellate

sive jurisdiction to review Industrial Board proceedings in the Appellate Court, but did not contain any procedure for a further review to the Supreme Court. However, the Supreme Court took the appeal in the *Warren* case. It reversed its former position that there was no right of transfer, under supreme court rules, of workmen's compensation cases from the appellate court to the Supreme Court¹⁴ and that the determination of the appellate court was final in such cases,¹⁵ holding that transfer of the case was allowed under the supreme court rules.¹⁶

The court, in *Warren*, treated appeals from administrative agencies as newly-instituted judicial actions at the appellate court level¹⁷—not as mere continuations of the administrative proceedings¹⁸—and, therefore, subject to the constitutional principle that the “courts shall be open; and every man, for injury done to him in his person, property or reputation shall have remedy by due course of law.”¹⁹

Court for errors of law under the same terms and conditions as govern appeals in ordinary civil actions.”

14. *Kingan & Co. v. Ossam*, 190 Ind. 554, 131 N.E. 81 (1921).

15. The court's language in the *Kingan* case, *supra* note 14, was quite strong. It was there held that the general statute governing the transfer of cases from the Appellate Court to the Supreme Court “must” give way to the Compensation Act, which was special in nature and which indicated by its language that no transfer in cases arising thereunder was contemplated.

16. The reasoning given in support of such action was that an “appellant may not be denied his right to present his case to the court of last resort for review because the Legislature has not provided a means for bringing it there.” 217 Ind. 93, 114-5.

17. The exact language of the *Warren* decision, so oft-quoted, is: “Strictly speaking, there is no such thing as an appeal from an administrative agency. It is correct to say that the orders of an administrative body are subject to judicial review; and that they must be so to meet the requirements of due process.” 217 Ind. 93, 105. This language is still followed more than 20 years later. See *Ball Brothers Co. v. Review Board of Indiana Emp. Sec. Div.*, 167 N.E.2d 469 (Ind. 1960); *Sizemore v. Public Service Commission*, 167 N.E.2d 343 (Ind. 1960); *Martin v. Indianapolis Water Co.*, 162 N.E.2d 709 (Ind. App. 1959); *Graver Tank Manufacturing Co. v. Maher*, 238 Ind. 226, 150 N.E.2d 254 (1958). An assignment of errors in statutory appeal from order of Public Service Commission is an initial pleading in the Appellate Court. *Martin v. Indianapolis Water Co.*, *supra*.

18. *But see Square Deal Co. v. O'Neal*, 225 Ind. 49, 72 N.E.2d 654 (1947), where the Supreme Court concluded, notwithstanding the route provided by the *Warren* case, that the legislature itself had provided a procedure for transferring workmen's compensation cases from the Appellate to the Supreme Court.

19. CONSTITUTION OF INDIANA, Article 1, § 12. Subsequent cases have followed the *Warren* theory in holding that the General Assembly, by enacting a provision in the statute providing that there shall be no appeal from such judgment, could not take from the Supreme Court its constitutional appellate jurisdiction: *Board of Medical Registration and Examination v. Moore*, 224 Ind. 621, 70 N.E.2d 354 (1947); *Joseph E. Seagram & Sons, Inc. v. Board of Comm'rs*, 220 Ind. 604, 45 N.E.2d 491 (1943). The so-called “inherent right to review” doctrine enunciated in the *Warren* case has even been extended by the courts to non-administrative situations. See *State ex rel. White v. Hilgemann, Judge*, 218 Ind. 572, 34 N.E.2d 129 (1941) (involving a first degree murder conviction). The Supreme Court, outdoing itself to be sure “due process” was allowed, used the *Warren* case as its basis for ordering the trial court to appoint competent counsel to handle relator's pauper appeal, stating: “In *Warren v. Indiana Telephone Co.*, . . . it was concluded . . . that the Constitution of Indiana guarantees an *absolute*

At this point in order to fully discuss the views taken by the Indiana courts in reconciling the *Warren* holding with the statutes relating to appeals from administrative orders, it may be helpful to categorize those statutes generally as follows:²⁰ (1) those which allow an appeal but provide a definite limited procedure which must be followed or all rights of recourse to the courts²¹ shall terminate;²² and (2) those statutes which initially preclude review either beyond the trial court or agency level.²³

right to a review by this court; that the legislature has the right to regulate and provide procedure for obtaining a review, but not to curtail or deny the right. Review has been made available by the statutory appeal, but the right to review is available in *all* cases, and where the statutory appeal is inadequate, the writ of error or some other appropriate means may be resorted to." *Id.* at 575. (Emphasis added). It is questionable that the *Warren* doctrine, as originally expounded, was meant to extend this far.

20. Unfortunately, these classifications overlap; more than one type of limitation or preclusion may be found in a given special proceeding statute. For example, IND. ANN. STAT. § 48-4501 (Burns 1950) (appeals from council or city boards decisions). Section 1 of the Act provides a complaint must be filed with a superior or circuit court within 30 days from the date of the action or decision complained of. Section 5 specifically sets forth that the order and judgment of the trial court (as provided in Section 1) shall be final and conclusive upon all parties and no appeal shall lie therefrom except upon questions affecting solely the jurisdiction of the court. In addition, Section 6 provides that any such appeal beyond the trial court level is to be governed by the provisions of the civil code, except that it shall be fully perfected within 60 days from the final ruling or action of the trial court and shall be taken directly to the Supreme Court.

21. The use of the words "court" or "trial court" here necessarily includes the Appellate Court in its capacity to initially review an order of an administrative agency directed by statute to its jurisdiction. Thus, in this capacity, it sits in the same relation as a circuit or superior court sits in relation to initial proceedings for review from the administrative orders directed by statute to its jurisdiction.

22. *E.g.*, IND. ANN. STAT. § 63-3001-3024 (Burns 1951) (Administrative Adjudication and Court Review Act). This act is applicable to all state agencies except those specifically excluded. IND. ANN. STAT. § 48-4501-4509 (Burns 1950) (provides procedure for appeals *otherwise allowable by law* from city councils or boards). These provide that an appeal must be taken from the circuit or superior court where initial "review" was had directly to the Supreme Court of Indiana within a shorter time limit than is provided by the Supreme Court's own rules. Another type of procedural restriction is the requirement that no appeal shall lie from the trial court's judgment except upon questions affecting solely the jurisdiction of the court. IND. ANN. STAT. § 48-4505 (Burns 1950). In some instances the restrictions are upon the parties. IND. ANN. STAT. § 48-4608 (Burns 1950) (Levees and Drains). This statute provides that an appeal may be taken only by any person who *previously remonstrated* against the assessments made by the Board of Public Works. The Public Service Commission Act, IND. ANN. STAT. § 54-443 (Burns Supp. 1961) provides that an appeal may be taken only by parties *adversely affected by any final decision* of the Commission and § 54-444 of the same statute provides that if a petition for rehearing is filed with the Commission by *any party to the proceeding* before the Commission, the right to appeal shall terminate 30 days after the Commission's ruling on such petition for rehearing.

23. *E.g.*, IND. ANN. STAT. § 48-2111 (Burns 1950) provides for an appeal from the Board of Public Works to the circuit or superior court, whose decision and judgment shall be final and conclusive upon all parties thereto and no further appeal shall be taken. To the same effect are: IND. ANN. STAT. § 48-6105 (Burns 1950) (appeal from actions of Board of Public Safety or Board of Metropolitan Police Commissioners); IND. ANN. STAT. § 48-8515 (Burns 1950) (appeal from action of the Redevelopment Commissioners); IND. ANN. STAT. § 63-214 (Burns 1951) (appeal from decision of Indiana Athletic Commission); IND. ANN. STAT. § 48-4609 (Burns 1950) (appeal from assessments of Board of Public Works). Another type of preclusive statute provides the

This note concentrates on the impact of the *Warren* case upon situations arising under the foregoing types of statutes. The *Warren* decision has been interpreted to permit an appeal from an administrative decision in many cases in which the statutory procedures have not been followed and in many cases in which no statutory review has been made available. If the Indiana courts are thus providing a form of "constitutional" judicial review of agency actions on the basis of the *Warren* case as a matter of right and in spite of statutory restrictions, then traditional judicial review doctrines may no longer be controlling in Indiana.

(1) *Statutory Procedures Not Followed*

If the special statutory procedure had not been strictly complied with, the pre-*Warren* holdings would have automatically precluded further review, except in those instances when a question of the constitutionality of a statute or the jurisdiction of the court was raised in the trial court.²⁴ This view, although not completely superseded,²⁵ can no longer be regarded as absolute. Using *Warren* as the basis for their decision in most cases, the Indiana courts now tend to overlook failures of strict compliance with procedures afforded by the special review statutes. Abandonment of the old rule is most evident in those cases in which the appellant has not complied with the time requirements or limitations in the special statute.²⁶ For example, in *Hansen v. Town of Highland*,²⁷ the Supreme

decision of the administrative official or body is "final" and no appeal shall lie therefrom. For example, IND. ANN. STAT. § 64-314 (Burns 1951) provides the action of the State Board of Tax Commissioners shall be final and conclusive upon appeals to it by municipal corporations or board of county commissioners. To the same effect is § 64-1331 (appeals by the taxpayers) and § 64-1332 (appeals from municipal bond issues).

24. *City of Elkhart v. Misner*, 211 Ind. 20, 24-25, 5 N.E.2d 501 (1936): "When either the question of constitutionality of an act or the jurisdiction of the court is presented by the issues to the trial court, it does not lie within the power or authority delegated to the legislative branch of the state government to declare that such questions may not be reviewed on appeal to this court."

25. *Ballman v. Duffeey*, 230 Ind. 220, 102 N.E.2d 646 (1952) (statutory certiorari proceeding filed pursuant to IND. ANN. STAT. § 53-783 (Burns 1951) to review a decision of the Board of Zoning Appeals of City of Indianapolis). The appeal was dismissed because it was not presented to the court within 30 days after the entry of the Board's final decision. The court held that a failure to comply with the statute was jurisdictional and that it did not, therefore, acquire jurisdiction of the parties or subject matter of the case. See also *White v. Board of Medical Registration & Examination*, 235 Ind. 572, 134 N.E.2d 566 (1956) (appeal dismissed because of failure to file petition for review within 15-day limitation of the Administrative Adjudication and Court Review Act).

26. *E.g.*, *Board of Zoning Appeals v. School City of Mishawaka*, 127 Ind. App. 683, 145 N.E.2d 302 (1957). Here an argument that a superior court had no jurisdiction, because of a failure to give the Board of Zoning Appeals twenty days to show cause why a writ of certiorari should not issue as provided by the special statute, was held invalid on the ground that a failure to comply with the statutory requirements does not deprive the court of jurisdiction of the subject matter which the statute expressly confers on it.

27. 237 Ind. 516, 147 N.E.2d 221 (1958) (proceedings before Board of Metropolitan

Court applied its own 90-day rule in allowing an appeal to be taken in the face of statutory language requiring the petitioner to file his transcript and assignment of errors within sixty days.²⁸ A later case defended the supremacy of the court's own rules over the statutory time limit by classifying the time, place and method of doing an act in court as a question of procedure.²⁹ According to this theory then, any conflict in procedure between the special statute and the supreme court rules would be resolved in favor of the rules. Thus if appeals from administrative agencies are timely filed under the supreme court rules governing regular civil procedure, the court is apparently prepared to allow the appeal even though it is untimely under the special statute. But an unreasonable filing, 175 days after rendition of the administrative order, still comes too late.³⁰

The *Warren* decision has been utilized by the Indiana courts not only to indicate that lateness in filing an appeal under a special statute will not be fatal, but also as the basis for findings that statutory procedures may not cut off the availability of the courts. Thus, when a question was presented, upon the filing of a motion for a new trial by remonstrators, that the special statute did not contemplate such a pleading, the court held that in the absence of any provision in the special act to the contrary, the court could properly resort to the general procedure provided for the government of the courts wherein jurisdiction was vested.³¹ A more radical departure from the traditional "follow-the-procedure" doctrine was made in *Mann v. City of Terre Haute*.³² In that case the Supreme

Police Commissioners). The town filed a motion to dismiss the attempted appeal on the ground that appellant's transcript was not filed within the 60-day time limit set up in IND. ANN. STAT. § 48-4501 (Burns 1950) governing appeals from the Board.

28. The court in the Hansen case, *supra* note 27, based its reasoning upon *City of Michigan City v. Williamson*, 217 Ind. 598, 28 N.E.2d 961 (1940); *City of Michigan City v. State ex rel. Seidler*, 211 Ind. 586, 5 N.E.2d 968 (1937), in which cases the court had held the supreme court rule time limitation applied to the general appeal statutes, and since the town had failed to cite any cases during the 24 years since the 1933 Act where the 60-day limitation provided therein had been applied, the court was not now inclined to interpret the statute so as to fix a shorter limitation for appeals, particularly in the interest of not "misleading" litigants.

29. *State v. Gibson Circuit Court*, 239 Ind. 394, 157 N.E.2d 475 (1959) (involving remonstrances against a levee proceeding).

30. *Gulick v. Marion Circuit Court*, 230 Ind. 232, 102 N.E.2d 762 (1952) (attempt to appeal from judgment of circuit court affirming determination of Indiana State Personnel Board).

31. *State ex rel. Barner v. White Circuit Court*, 237 Ind. 443, 147 N.E.2d 10 (1958).

32. 163 N.E.2d 577 (Ind. 1960). This was an action by the taxpayers to enjoin the city from issuing revenue bonds to finance sewage treatment and disposal plant construction in an effort to comply with an order of the Stream Pollution Control Board. Appellants claimed the act creating the above board was unconstitutional in that it contained no provision giving taxpayers and property owners interested in such projects any statutory proceeding for judicial review as to the unreasonableness or desirability of the proposed public works. However, in *Southport Board of Zoning Appeals v. Southside Ready Mix Concrete*, 176 N.E.2d 112 (Ind. 1961), the court did not apply

Court accepted review of a proceeding presented by way of an action for injunction even though the appeal under the statutory procedure had not been perfected at all. On the basis of the *Warren* case, the court flatly stated that a review by way of a proceeding in equity asking for an injunction against the alleged erroneous action of the board, commission or governmental corporation could be had whenever the legislature failed to provide a sufficiently broad statutory remedy of appeal. Clearly the *Mann* case casts doubt upon the traditional theory that the special procedure must be followed at least to the extent of the remedy made available by statute before resort is made to any common law or equitable remedy.³³

However, the foregoing does not mean that the court will go so far as to disturb the non-procedural rules governing judicial intervention. The courts will still respect the integrity of the administrative process until it is completed. Thus, if the administrative decision appealed from is merely one making tentative and preliminary recommendations the courts are without jurisdiction to review.³⁴ Those decisions are not binding upon anyone; final action must still be taken by some other body. On the other hand, if it can be shown that the order appealed from is an initial integral step in a regulatory scheme, the Supreme Court has held that appellant is not required to await a further regulatory order before contesting the agency's jurisdiction.³⁵ Also the court will not intervene except at the behest of a litigant with an interest in the proceeding, *i.e.* he must have the required standing to sue under the applicable statute. For example, an attempted appeal from a public service commission water rate order was dismissed because appellants had not shown they were persons "adversely affected" by a final decision of the commission as provided by

the *Mann* doctrine when confronted with a statute which was silent as to any judicial review of, or appeal from, the authority of the Town Engineer to issue building permits. The court distinguished between the two situations on the ground that in the *Southport* case there was no allegation of any arbitrary, illegal or erroneous action on the part of the administrative official. Therefore the board of zoning appeals was enjoined from asserting any jurisdiction to review the issuance of a building permit for a construction project.

33. The traditional "follow-the-statute" first doctrine is well laid out in *Public Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (1956). Even when the jurisdiction of the administrative agency is challenged, it has been held that the reviewing court must withhold its action until the administrative remedies have been exhausted. *City of East Chicago v. Sinclair Refining Co.*, 232 Ind. 295, 111 N.E.2d 459 (1953).

34. *Droege v. St. Joseph County Plan Comm'n*, 175 N.E.2d 432 (Ind. App. 1961); *McGraw v. Marion County Plan Comm'n*, 174 N.E.2d 757 (Ind. App. 1961); *Wright v. Marion County Plan Comm'n*, 163 N.E.2d 259 (Ind. App. 1960).

35. *Boone County REMC v. Public Serv. Comm'n*, 129 Ind. App. 175, 155 N.E.2d 149 (1958).

statute.³⁶ Further, the courts are hesitant to accept review when faced with the possibility that if the statutory procedure is not strictly followed it will result in unfairness to third parties in terms of venue³⁷ or notice.³⁸

There seems to be little ground for reconciling the *Mann* decision with the above decisions requiring statutory procedures to be followed. If the *Mann* decision is interpreted as permitting resort to the court *before* the statutory procedures have been exhausted, it would seem to violate the order of appeal just as much as a case in which an appeal was accepted from an intermediate order. The distinction may be that, in accepting the court's proposition that statutes may not limit its jurisdiction, failure to exhaust an *inadequate* procedure will not be required. This view would be in keeping with those cases which do not require exhaustion of an administrative procedure when it is likewise futile or incomplete. A later case, *Bole v. Civil City of Ligonier*,³⁹ would seem to go a step further. In that case the court allowed a discharged policeman to use a common law remedial action in spite of the procedure provided in the special statute relating to appeals from the decisions of the board of safety; the reasoning given was that a special statute did not render unavailable a plaintiff's existing common-law rights and remedies.

(2) *Preclusive Statutes*

So far we have concentrated upon the effect of the *Warren* decision in those situations involving statutes which afford some sort of an appeal, even though the litigants have not perfected their appeals under the statutory procedures. Quite a different problem arises when review is sought of administrative actions under statutes attempting to preclude review. One such statute provides an appeal to an inferior court, but attempts to limit a further appeal by providing the lower court's decision shall be final.⁴⁰ This is the classic *Warren* situation, and the courts have not permitted the statute to so limit the court's constitutional jurisdiction.

36. *Martin v. Indianapolis Water Co.*, 162 N.E.2d 709 (Ind. App. 1959).

37. *State ex rel. Marion County Plan Comm'n v. Marion Superior Court*, 235 Ind. 607, 136 N.E.2d 616 (1956). The statute provided that decisions of the plan commission could be reviewed by statutory certiorari proceedings filed in the circuit court. Suit had been filed in the superior court. The Supreme Court found that a suit filed in the wrong court was not within the statutory remedy and therefore the superior court was without jurisdiction in this case.

38. *Kupfer v. Board of Zoning Appeals of Indianapolis*, 162 N.E.2d 110 (Ind. App. 1959). The zoning statute provided that when statutory certiorari proceedings were filed, notice was to be served by the sheriff upon the adverse party. In this case service was made by mailing a copy of the pleading to the attorney for the party defendant. The court held this was inadequate procedure under the zoning act; the adverse party had to be served personally.

39. 174 N.E.2d 412 (Ind. App. 1961).

40. See note 23 *supra*.

One approach used by the courts in overriding this statutory limitation has been that the General Assembly is without power to take from the Supreme Court its constitutional appellate jurisdiction.⁴¹ The *Hansen*⁴² case disposed of such statutory restrictions⁴³ on the ground that statutes of this nature shall be of no effect and that litigants have a constitutional right to a further review on the basis of the *Warren* case. The foregoing would seem to indicate the courts consider their constitutional appellate jurisdiction sufficiently broad to include even those situations in which their jurisdiction has been denied by the legislature.

A major problem arises however, with the second type of statute which attempts to give a preclusive effect to the administrative determination.⁴⁴ Elsewhere, statutory preclusions of this kind have been respected.⁴⁵ But the Indiana courts, following the *Warren* decision, have denied a preclusive effect by permitting recourse to prerogative writ procedures in spite of the statutory foreclosure. For example, in *State ex rel. Smitherman v. Davis*⁴⁶ an action in mandamus was allowed to compel school trustees to transfer school pupils from one school system to another even though the statute provided the decision of the county superintendent of schools was final.⁴⁷ The court found that the nature of the discretionary act in *Smitherman* directly and substantially affected the lives and property of the public. In this case the common law writ would have been available on orthodox grounds but for the statutory restrictions. Discretionary acts of public officials, which directly and substantially affect the lives and property of the public have always been subject to review when the action of such officials is alleged to be fraud-

41. An earlier indication of this trend can be found in *City of South Bend v. Whitcomb & Keller*, 224 Ind. 99, 64N.E.2d 580 (1946) (appeal from assessments of benefits and damages by board of public works); *Prunk v. Indianapolis Redevelopment Comm'n*, 228 Ind. 579, 93 N.E.2d 171 (1950) (proceedings under the Redevelopment Act of 1945).

42. *Hansen v. Town of Highland*, 237 Ind. 516, 147 N.E.2d 221 (1958).

43. IND. ANN. STAT. § 48-6105 (Burns 1950) which provides the decision of a trial court with respect to an appeal from a board of metropolitan police commissioners shall be final.

44. See note 23 *supra*.

45. 3 DAVIS, ADMINISTRATIVE LAW § 28.20 (1958) and cases cited.

46. 238 Ind. 563, 151 N.E.2d 495 (1958).

47. The statute under attack here is an excellent example of legislative stubbornness. IND. ANN. STAT. § 28-3705 (Burns 1948). Prior to 1959, the Act provided that if an order of transfer be denied, an appeal could be taken to the county superintendent of schools, whose decision was to be final. The Act was amended in 1959 (and altered slightly in 1961) so it now provides that an appeal can be taken from an adverse ruling of the county superintendent of schools (within 30 days) to the Commission on General Education of the Indiana State Board of Education, whose decision shall be final. This statute is extremely interesting in that the amendments of 1959 and 1961 were made after the Supreme Court's decision in *State ex rel. Smitherman v. Davis*, note 45 *supra*, that the legislature cannot make the decision of an administrative officer final.

ulent, arbitrary or capricious.⁴⁸ Apparently, this is the distinguishing line between the type of non-reviewability upheld in attempted appeals from decisions of the Alcoholic Beverage Commission concerning liquor or beer permits.⁴⁹ In those cases the court has found an absolute lack of property right in such permits expressly stated in the statute.⁵⁰ Thus, if the court fails to find a substantive right which it can protect, as in the alcoholic beverage license cases, it may find preclusion; in cases like *Smitherman* where it finds a protected interest, it will use the extraordinary writs to provide peripheral review in spite of the statute.

CONCLUSION

The Indiana courts since the *Warren* case appear to have modified the ordinary doctrines of judicial review of administrative actions. Thus judicial review in Indiana no longer seems dependent on explicit statutory provisions or on the availability of one of the extraordinary writs. Statutory procedures, even though not followed, have not always been allowed by the courts to prevent judicial intervention. While the court apparently has reserved the power to regulate its own jurisdiction by disregarding defects in the perfection of individual appeals, it has not always been consistent in doing so. A major factor in the determination by the courts as to whether or not to accept review seems to be the nature of the rights affected. Also the courts have permitted resort to actions in equity and the extraordinary writs even though the words of the statute could well have been interpreted to make the action of the administrative agency final. These decisions, based on the *Warren* holding that judicial review of agency action is a matter of "constitutional right," appear to have accomplished what other courts have accomplished by way of statutory

48. *Columbia Properties v. State Board of Tax Comm'rs*, 232 Ind. 262, 111 N.E.2d 891, *appeal dismissed and cert. denied* 346 U.S. 879 (1953); *Phillips v. Officials of City of Valparaiso*, 233 Ind. 414, 118 N.E.2d 398 (1954); *Slentz v. City of Fort Wayne*, 233 Ind. 226, 118 N.E.2d 484 (1954); *Smith v. Lippman*, 222 Ind. 261, 53 N.E.2d 157 (1944); *Coleman v. City of Gary*, 220 Ind. 446, 44 N.E.2d 101 (1942).

49. *State ex rel. Alcoholic Beverage Commission v. Superior Court Vanderburgh County*, 229 Ind. 483, 99 N.E.2d 247 (1951); *State ex rel. Zeller v. Montgomery Circuit Court*, 223 Ind. 476, 62 N.E.2d 149 (1945).

50. IND. ANN. STAT. § 12-443 (Burns 1956): "No person shall be deemed to have any property right in any . . . beer . . . liquor . . . permit, nor shall said permit itself or the enjoyment thereof be considered a property right. All . . . permits . . . shall be issued, suspended or revoked in the absolute discretion and judgment of the commission. No court shall have jurisdiction of any action, either at law or in equity, to compel the issuance of any such permit, or to revoke, annul, suspend or enjoin any action, ruling, finding or order of the commission suspending or revoking any such permit, and the consent of the sovereign state of Indiana is hereby expressly withdrawn and denied in any such action, either at law or in equity."

interpretation,⁵¹ although the Indiana cases still go further than those in most jurisdictions. However, the *scope* of review afforded does not appear to have been changed perceptively by the *Warren* case and its successors;⁵² the availability of review has been merely liberalized. To the extent this trend seems to overcome the prior deficiencies in the field of availability of judicial review of administrative actions, it perhaps amounts to a reform in that area. The trend thus indicated in the decisions may be good insofar as it implements judicial control, but it throws the status of many statutes in doubt.

51. *Leedom v. Kyne*, 358 U.S. 184 (1958), noted 73 HARV. L. REV. 217 (1959). See also Note, 36 IND. L.J. 484 (Summer 1961).

52. Even in *Mann v. City of Terre Haute*, 163 N.E.2d 577, 579-580 (Ind. 1960), the court made this quite clear, after citing the *Warren* case, by its use of the following language: "This does not mean the courts will review the administrative action of any board, commission or governmental corporation for the purpose of substituting its opinion or judgment for that of the board in discretionary matters within the jurisdiction of such an administrative body. The courts will, however, review the proceedings to determine whether procedural requirements have been followed and if there is any substantial evidence to support the finding and order of such a board. The courts will also review the proceedings to determine whether or not the order of the board, its judgment or finding, is fraudulent, unreasonable or arbitrary, if requested." (Emphasis added.)

EDITOR'S NOTE

The Note, "Rights of Federal Government Personnel Under the Copyright Act," 37 Indiana Law Journal 105 (1961), has been awarded third prize in the National Nathan R. Burkan Memorial Competition. The note will be reprinted in *ASCAP Copyright Law Symposium Number 12* which will be published by Columbia University Press.