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Review by Certiorari in Indiana

NOTES AND COMMENTS

ADMINISTRATIVE LAW

REVIEW BY CERTIORARI IN INDIANA

For the first time the Indiana Supreme Court in *Warren* v. *Indiana Telephone Co.*[1] reviewed by a proceeding similar to common law certiorari[2] the determination of an administrative tribunal. By ordering the entire record to be brought before it so that the questions presented to and passed upon by the Appellate Court might more clearly appear,[3] the Supreme Court exceeded its statutory authority[4] and one of its rules.[5] Until this decision the settled rule had been that in a transfer the Supreme Court examined only the written opinions of the Appellate Court, making no inquiry into the record upon the theory that the purpose of the transfer act was to enable the Supreme Court to control the declarations of legal principles expressed in the Appellate Court's opinions and that it did not afford a means for reviewing cases on their merits.[6] Implicit in the Supreme Court's position is the power to superintend and control inferior courts and administrative boards. Therefore, it is timely to inquire into the office and function of certiorari—as a non-statutory power.

Until the *Warren* case the sole direct authority as to certiorari in Indiana was *Indianapolis* v. *L. C. Thompson Mfg. Co.*[7] With reluctance the Appellate Court decided that common law certiorari was not available for the reason that it was not *authorized* by the code of 1852; therefore, a statute making final the decision of an inferior court precluded review by certiorari. Contrary to this result is the general rule prevailing elsewhere, that such a statute restricting appeal does not bar review by certiorari.[8] The Court failed to recognize that it is the very nature of certiorari to furnish a review in those situations where there has been a miscarriage of justice in the inferior tribunal. Directly opposed to the dogma of the *Thompson* case is the early case of *Commissioners* v. *Brown*,[9] where the Supreme Court in the absence of a statutory remedy issued a rule to show

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[1] 26 N. E. (2d) 399 (Ind. 1940).

[2] Although the court granted a writ of error, it had all the characteristics of a common law writ of certiorari.

[3] This was also done by the Court in the subsequent case of Long v. Van Osdale, 29 N. E. (2d) 953 (Ind. 1940) citing the *Warren* case as authority.

[4] IND. STAT. ANN. (Burns, 1933) §4-215.

[5] Rules of the Indiana Supreme Court 1940, 2-23.

[6] Barnett v. Bryce Furnace Co., 157 Ind. 572, 62 N. E. 6 (1901); Huntington v. Lusch, 163 Ind. 266, 71 N. E. 647 (1904); Julian v. Bliss, 196 Ind. 68, 147 N. E. 148 (1924). By issuing an order "Per Curiam—Judgment Affirmed" the Appellate Court can no longer exclude the Supreme Court from final jurisdiction. Hunter v. Clev., C. & St. L. Ry., 202 Ind. 328, 174 N. E. 287 (1930).

[7] 40 Ind. App. 535, 81 N. E. 1159 (1907).

[8] State v. Graham, 60 Wis. 395, 19 N. W. 359 (1884); Allen v. Comm., 57 Miss. 163 (1879); State *ex rel* McCallum v. Cowlitz County, 72 Wash. 144, 129 Pac. 900 (1913).

[9] 14 Ind. 191 (1860).

cause why a judgement below should not be revoked, admittedly to serve the purpose of a common law writ of error coram nobis. The Court proceeded on the assumption that common law remedies were available in extraordinary situations, under different names. In contrast with the language in the *Thompson* case that only code remedies are available is the statement of the Supreme Court that an equitable writ of assistance may be granted in the absence of an adequate code substitute.[10] The *Thompson* case denying the availability of common law certiorari is unsound and the result reached in the *Warren* case is to be preferred.

Although there is no Supreme Court case prior to the *Warren* case directly in point, there has been comment about certiorari by that Court. *Newman* v. *Gates*[11] has been discussed as authority that certiorari obtains in Indiana;[12] but doubt exists as to the correctness of that interpretation. In *Curless* v. *Watson* the majority and concurring opinions speak of certiorari as inherent in the Supreme Court, existing independently of any legislative grant.[13] That was a proper conclusion since the rationale of the *Warren* case is that common law certiorari exists as an inherent attribute of the judicial power granted to the courts by the Indiana Constitution.

At common law the Court of King's Bench, as a superior court, had the inherent power to superintend inferior tribunals and this control was effectuated by means of the extraordinary writs of certiorari, prohibition and mandamus.[14] A number of state constitutions grant to the court of final appellate jurisdiction a general superintendency over inferior tribunals.[15] Elsewhere there are similar statutory provisions,[16] but *caveat* whether such statutes are merely declaratory of the common law. In the absence of an express constitutional or statutory provision, it has been held in some states that the writ of certiorari is inherent in a supreme court.[17] Although expressly abolished in Nebraska, certiorari, in effect, is available under the code,[18] In Indiana there is no constitutional or statutory provision expressly authorizing the Supreme Court to issue writs of certiorari.

Nevertheless, from a consideration of the Indiana territorial laws and early statutes it is evident that there was an intention to

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[10] Emerick v. Miller, 159 Ind. 317, 64 N. E. 28 (1902).

[11] 150 Ind. 59, 49 N. E. 826 (1898).

[12] Curless v. Watson, 180 Ind. 86, 105, 102 N. E. 497, 504 (1913) (concurring opinion).

[13] Curless v. Watson, 180 Ind. 86, 99, 104, 102 N. E. 497, 503, 504 (1913).

[14] 3 BL. COMM. *111; BACON ABRIDGEMENT (Bouvier 1876) Courts, Certiorari, Mandamus, Prohibition.

[15] MONT. CONST. Art. VIII §2, COLO. CONST. Art. VI §2, N. DAK. CONST. Art. IV, §86, OKLA. CONST. Art. VII, §2, WIS. CONST. Art. VII, §3). Similar provisions are found in eleven other state constitutions.

[16] MASS. LAWS ANN. (Michie, 1933) c. 211, §3, Public Laws of N. Hamp. (1926) tit. 31, c. 315, §2.

[17] Territory v. Valdez, 1 N. M. 533 (1872); Tenn. C. Ry. v. Campbell, 109 Tenn. 640, 75 S. W. 1012 (1903).

[18] Engels v. Morgenstern, 85 Neb. 51, 122 N. W. 688 (1909); Mathews v. Hedlund, 82 Neb. 825, 119 N. W. 17 (1908); Moline, Milburn and Stoddard Co. v. Curtis, 38 Neb. 520, 57 N. W. 161 (1893).

preserve review by common law certiorari. In the Indiana territory the General Court, as the supreme court, had power to issue "writs of habeas corpus, certiorari, error and all remedial and other writs."[19] Circuit courts were also vested with full power and authority to issue writs of mandamus, dower, certiorari, partition, view, quo warranto, habaes corups, error coram nobis, replevin and ne exeat.[20] In the Constitution of 1816 it is stated that all territorial laws not inconsistent therewith shall continue in full force.[21] At the first session of the General Assembly the Supreme and Circuit courts were invested with the same power and authority which the General and Circuit courts possessed and exercised under the territorial government.[22] At the same session the Supreme Court was authorized to issue "all kinds of writs, orders and process *according to the course of the common law and the usages of courts*,"[23] and circuit courts likewise were empowered to issue "writs of mandamus, habeas corpus, and process necessary to carry these said powers into effect *according to the course of the common law and the usages of courts*."[24] By the Revised Laws or Statutes of 1824, 1831, 1838 and 1843 the Supreme Court was authorized to issue "all writs and process."[25] However, in the Revised Statutes of 1852 it was provided that the Supreme Court shall issue "all process"[26]—a conspicious omission of "writs." Apparently, zealous legislators over-looked the fundamental distinction between the ordinary and the extra-ordinary common law actions. On the other hand, the New York Code of 1849 maintained this distinction by recognizing two kinds of remedies, namely, "actions" and "special proceedings."[27]

Furthermore, during the 1850 constitutional debates concerning the original jurisdiction of the Supreme Court, a statement was made which applied to all extraordinary remedies. Mr. Biddle said:

"I would simply ask the gentleman whether the granting a writ of mandamus is original jurisdiction? It may possibly be so, but *it is inherent in the Supreme Court to compel obedience to its mandates by mandamus, or other process, and you need not specifically grant them this power.* The power to fine is an original jurisdiction, but it belongs inherently to all courts. The Circuit Courts are sufficient for all cases where the writ of mandamus may become necessary."[28]

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[19] Laws of the Indiana Territory Rev. Stat. (1807) c. 3, §1, reproduced in Illinois Historical Collections, vol. xxi (1930), Indiana Historical Collections Reprint (1931) 230.

[20] Ind. Acts. 1814 c. 2, §3.

[21] IND. CONST. Art. XII, §4.

[22] IND. LAWS (1816-17) c. 3, §1, 2.

[23] IND. LAWS (1816-17) c. 1, §7.

[24] IND. LAWS (1816-17) c. 2, §5.

[25] IND. REV. LAWS (1824) c. 25, §9; (1831) c. 24, §9; (1838) c. 25, §15; (1843) c. 37, §1.

[26] IND. REV. STAT. (1852), c. 1, §5.

[27] New York Laws 1849, c. 438, §1. Common law certiorari is a special proceeding within the meaning of the code. People v. Fuller, 40 How. Prac. 35 (N. Y. 1870).

[28] Debates in Indiana Convention (1850), 1684, Indiana Historical Collections Reprints.

It is submitted that Indiana statutes defining the powers of the courts are merely declatory of the common law. Because certiorari is such a valuable writ, the general rule is that it can be taken away or restricted only by some clear legislative enactment or express language to that effect.[29] Therefore, as a statutory matter the result reached by the Supreme Court in the *Warren* case is justifiable.

The Supreme Court has taken conflicting positions as respects its inherent power to issue writs of mandamus and prohibition in aid of its constitutional jurisdiction. In 1821, by virtue of the judicial power, the Court had no difficulty in mandating a circuit court to make an order conforming to a judgment which had been reversed.[30] More than a hundred years later the Court in a very strong *dictum* stated that it had the power implied under the constitution to issue writs necessary to exercise completely and properly its jurisdiction in appeals.[31] In the absence of any statute the Supreme Court now can mandate the Appellate Court.[32] During the intervening years, however, the Supreme Court steadfastly maintained the contrary position, namely, that the authority to issue writs of mandamus and prohibition in aid of its appellate jurisdiction was purely statutory.[33] In view of the *Warren* case the net result is that the Supreme Court possesses, under the constitution, a general superintending power.[34]

Certiorari is the proper remedy to review the "judicial" or "quasi-judicial" conduct of inferior boards and officers, not that which

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[29] New Jersey R. R. and Tr. Co. v. Suydam, 17 N. J. L. 25 (1839); Ritter v. Kunkle, 39 N. J. L. 259 (1877); Chase v. Miller, 41 Pa. 403 (1862).

[30] Jared v. Hill, 1 Blackf. 155 (Ind. 1821).

[31] State *ex rel* Hannahan v. Chambers, 203 Ind. 523, 525, 181 N. E. 282, 282 (1932).

[32] Warren v. Ind. Tel. Co., 26 N. E. (2d) 399 (Ind. 1940); State *ex rel* Daily v. Kime, 213 Ind. 1, 11 N. E. (2d) 140 (1937) (by implication); see State *ex rel* Sluss v. Appellate Court, 214 Ind. 686, 692, 17 N. E. (2d) 824, 827 (1938).

[33] Comm. v. Spitler, 13 Ind. 235 (1859); State *ex rel* Reynolds v. Comm., 45 Ind. 501 (1874); State *ex rel* Green v. Jeffries, 83 Ind. App. 524, 149 N. E. 373 (1925).

[34] Courts have inherent power to protect their dignity and punish contempts. Little v. State, 90 Ind. 338 (1883). On its own motion the Supreme Court may recall a former written opinion and substitute another in its place, even after term time. McBride v. Coleman, 189 Ind. 7, 125 N. E. 449 (1919). A rule-making power inheres in the Supreme Court, Smith v. State, 137 Ind. 198, 36 N. E. 108 (1894), and court rules can not be abolished by the General Assembly. Epstein v. State, 190 Ind. 693, 127 N. E. 411 (1920). Pursuant to legislative authorization, the Supreme Court can abrogate and declare ineffective practice acts. Rules of the Ind. Sup. Court, 1940. Statutes defining judicial power are only declaratory and statutes impinging or restricting judicial power are unconstitutional. Young v. State Bank, 4 Ind. 301 (1853); State *ex rel* Hovey v. Nobel, 118 Ind. 350, 21 N. E. 244 (1889); Guckien v. Rothrock, 137 Ind. 355, 37 N. E. 17 (1894). However, in failing to keep separate the concepts of judicial power and jurisdiction the Indiana Supreme Court in the *Warren* case reached a result contrary to that of the United States Supreme Court. *Ex parte* McCardle, 74 U. S. 506 (1869).

is discretionary. The question of what is a "judicial" or "quasi-judicial" act in Indiana has arisen as a separation of powers problem, and decisions of the Supreme Court on this issue will prove inadequate for determining if an act is of such a nature as to be reviewable by certiorari. The rule was early enunciated that "a judicial act must be performed by a court."[35] On the other hand, a duty which involves the exercise of discretion is generally characterized as "quasi-judicial."[36]

In order for Indiana courts to give full effect to review by certiorari, it will be necessary for them to adopt a less technical definition of "judicial" and "quasi-judicial" acts than the one formulated for the purpose of sustaining the constitutionality of statutes under a separation of powers problem. Courts must recognize that it is the nature of administrative boards and officers to exercise both a judicial power and a discretion and that it is the purpose of certiorari, in general, to review the former, not to disturb the latter. In certorari proceedings the the rule is for courts to look more at the character of the act performed and less at the nature of the body which performed it.

By statutory certiorari the illegality of decisions of municipal boards of zoning appeals is reviewed by circuit or superior courts.[37] Since it is restricted to making variances from district regulations, a board's decision re-zoning an entire city block is illegal,[38] but an "irregularity of procedure" is not.[39] Illegality includes a violation of a constitutional right.[40] By means of certiorari a circuit court may not review a board's discretion, but only an abuse thereof.[41] Under the guise of hearing supplementary evidence, the court will not be permitted to conduct a trial *de novo*.[42]

The *Warren* case states that upon reviewing an administrative order it is the duty of the court to determine the question of jurisdiction and to insure that the requirements of due process have been met. Other statements indicate that the nature and scope of certiorari in Indiana will be the same as generally obtain elsewhere either by statute or practice. Although it is usually announced that the reviewing

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[35] Flournoy v. Jeffersonville, 17 Ind. 169, 173 (1861). *Accord*: Jay v. O'Donnell, 178 Ind. 282, 98 N. E. 349 (1912); State *ex rel.* Hord v. Comm., 101 Ind. 69 (1884); Forrey v. Comm., 189 Ind. 257, 126 N. E. 673 (1919).

[36] State *ex rel.* Burroughs v. Webster, 150 Ind. 607, 50 N. E. 750 (1898); State *ex rel.* French v. Johnson, 105 Ind. 463, 5 N. E. 553 1885); Compare Stone v. Fritts, 169 Ind. 361, 82 N. E. 792 (1907) with Elmore v. Overton, 104 Ind. 548, 4 N. E. 197 (1885).

[37] IND. STAT. ANN. (Burns, 1933) §48-2305.

[38] Indianapolis v. Ostrom, 95 Ind. App. 376, 176 N. E. 246 (1932).

[39] Board of Zoning Appeals v. Moyer, 27 N. E. (2d) 905 (Ind. App. 1940).

[40] South Bend v. Marckle, 215 Ind. 74, 18 N. E. (2d) 764 (1938).

[41] Board of Zoning Appeals v. Waintrup, 99 Ind. App. 576, 193 N. E. 701 (1935).

[42] O'Connor v. Overall Laundy, 98 Ind. App. 28, 183 N. E. 134 (1933).

court will not pass upon the weight or sufficiency of the evidence,[43] nevertheless, it is equally true that in the absence of any evidence to support it, the decision or order will be set aside.[44] The rule is phrased thus: if there had been an ordinary trial, would it have been error to have submitted the question to the jury? The Court is also in agreement with the authorities when it states that a reviewing court will not weigh conflicting evidence[45] nor determine the credibility of witnesses.[46] On the other hand, however, in concluding that it will review an abuse of discretion, the Court enunciated the minority rule.[47] Nevertheless, the point has been well taken that the review of an abuse of judicial discretion is desirable if otherwise there would be no remedy.[48]

Finally, it is well to point out the possible effects of the *Warren* case upon judicial review in Indiana. Certiorari lies to review judgments of lower courts made final by statute. Thus, the judgments of circuit courts in statutory proceedings should be reviewable. In such cases, however, shall the petition be addressed to the Appellate Court or to the Supreme Court? Here is presented a procedure which the Supreme Court or the legislature must prescribe. As the Appellate Court is also a superior court, upon principle it has the authority to issue writs of certiorari. Or perhaps certiorari will issue only from those courts created by the constitution. However that may be, the same policy which provides that appeals in cases of mandate, prohibition, quo warranto, and habeas corpus shall be taken directly to the Supreme Court clearly is applicable to certiorari.[49] Also, a judgment of the Appellate Court in a certiorari proceeding can be transferred to the Supreme Court. Conceivably, circuit courts might issue writs of certiorari to review proceedings of county commissioners and cases in justices of the peace courts. "Judicial" or "quasi-judicial" acts of county and municipal officers and boards may also be reviewed by the circuit courts. From these judgments appeals could then be taken to the higher courts.

R. J. P.

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[43] New River Coal Co. v. Flies, 215 Ala. 64, 109 So. 360 (1926); Overstreet v. Ill. Power and Light Co., 356 Ill. 378, 190 N. E. 676 (1934); Carroll v. City Comm. of Grand Rapids, 266 Mich. 123, 253 N. W. 240 (1934).

[44] People *ex rel.* Cook v. Board of Police, 39 N. Y. 506 (1868); Appeal of Walker, 294 Pa. 385, 144 Atl. 288 (1928); Hanna v. Board of Alderman, 54 R. I. 392, 173 Atl. 358 (1934).

[45] See note 43, *supra.*

[46] Independence v. Pompton, 9 N. J. L. 209 (1827); People v. Swanson, 217 Mich. 103, 185 N. W. 844 (1921); Crocher v. Abel, 348 Ill. 269, 180 N. E. 852 (1932).

[47] *In re* Hanson, 2 Cal. 262 (1852); Appeal of Vaux, 109 Pa. St. Rep. 497 (1885). *Contra*: Commonwealth v. Roxbury, 8 Mass. 457 (1812); Tiedt v. Carstensen, 61 Iowa 334, 16 N. W. 214 (1883).

[48] Note (1932-33) 18 IOWA L. REV. 263.

[49] IND. STAT. ANN. (Burns, 1933) §4-214.