Part III

Agencies and the Courts

Judicial Review: The "Independent Judgment" Anomaly

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I

INTRODUCTION

The law of judicial review of administrative determinations in California can best be described as a hodge podge. It was not until 1945 that the California Legislature undertook to make a comprehensive statement of the law of judicial review,[1] and the shortcomings of a system which, like Topsy, just growed, were not to be corrected by any single stroke of the legislative pen. The result is that despite the clear and concise language of the Code of Civil Procedure providing the form and scope of judicial review of the decisions of administrative agencies in California, there remains a good deal of confusion and misunderstanding both in the courts and among the members of the bar on the subject of judicial review.

An analysis of the decisions of the courts during the ten year period since the adoption of section 1094.5 of the Code of Civil Procedure reveals certain problem areas that cause difficulty over and over again. Chief among those problem areas is the proper meaning to be given that provision of the code which provides that in certain types of cases the reviewing court is required to exercise an "independent judgment" on the facts of the case

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[1] See CAL. CODE CIV. PROC. §1094.5. For a background on the code provision, see TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 26 (1944). See also, FOURTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 22 (1953). Section 1094.5 should be read in conjunction with § 11523 *et seq.*, CAL. GOVT. CODE, hereinafter referred to as the state Administrative Procedure Act; *cf.* § 11440, regarding judicial review of rule making.

and is allowed to admit additional evidence in the mandamus proceeding.[2] This "right to a trial de novo," as it is popularly referred to, is an anomaly in the law which is difficult to define and confusing in application. It is the purpose of this article to inquire into the meaning of the review provisions authorizing the reviewing courts to exercise an "independent judgment," and to determine what the courts actually do under such a review provision. In order to put the present inquiry into proper perspective it will be necessary to say a few words about the historical development of the trial de novo concept and the independent judgment scope of review ultimately codified.[3]

A.

1936–1946: The Conservative Beachhead Established, Revisited—Retreat

By 1936 the Legislature of California had created innumerable statewide administrative agencies and delegated powers to them to adjudicate controversies by exercising what have been euphemistically called "quasi-judicial" powers. In cases where those delegations required a determination of rights and privileges after notice and hearing, it was generally conceded that judicial review was available by resort to certiorari in which the reviewing court would examine the administrative record to determine the question of whether or not the administrative order was supported by substantial evidence.[4] Overnight, however, the certiorari myth was exploded when the California Supreme Court in 1936 in the *Standard Oil*

[2] The proper form of procedure is a writ of mandate. CAL. CODE CIV. PROC. § 1094.5(a). The function of the reviewing court is to determine whether there has been any "prejudicial abuse of discretion." *Id.* § 1094.5(b). An abuse of discretion is established if the agency has not proceeded in the manner required by law, or if the order is not supported by the findings, or if the findings are not supported by the evidence. "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 . . . ." *Id.* § 1094.5(c). "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 . . . in cases in which the court is authorized by law to exercise its independent judgment on the evidence . . . admit such evidence at the hearing on the writ without remanding the case." *Id.* § 1094.5(d). Other procedures are established for cases in which the court is not authorized by law to exercise its independent judgment on the evidence. See note 27 *infra* on applicability of the independent judgment rule.

[3] See TENTH BIENNIAL REPORT, JUDICIAL COUNCIL OF CALIFORNIA 22 *et seq.* (1944). See also dissenting opinion of Mr. Justice Traynor in Moran v. Board of Medical Examiners, 32 Cal.2d 301, 315, 196 P.2d 20, 29 (1948); McGovney, *Administrative Decisions and Court Review Thereof, in California,* 29 CALIF. L. REV. 110, 148 (1941).

[4] See Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California,* 29 CALIF. L. REV. 275 (1941); Elliott, *Certiorari and the Local Board,* 29 CALIF. L. REV. 586 (1941). See also Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939–49,* 2 STAN. L. REV. 285 (1950); Comment, 25 CALIF. L. REV. 694 (1937).

case[5] held that the Board of Equalization, acting in a tax matter, could not constitutionally exercise judicial powers; since certiorari, according to the court's narrow view, would lie only to review "judicial" acts, the writ could not be used to review a decision of an administrative agency which, under the separation of powers provision, could not exercise "judicial" functions.[6] By the same line of reasoning, the court held in the *Whitten* case[7] that prohibition would not lie. The fact that these decisions posed a terrible dilemma with respect to the statewide agencies seemed wholly outside the court's comprehension. On the one hand, the decisions could have been interpreted to mean simply that the wrong remedy had been chosen, and, presumably, some other remedy would be available for review purposes. Or, and more fantastically, it might have meant that statewide agencies had been cut adrift, with no judicial review of their orders available. But neither possibility seemed to concern a court bent upon nullifying and/or preventing the advent of a little New Deal in California with its usual incidence of bureaucratic control and regulation.[8]

But despite the court's refusal to review the quasi-judicial acts of statewide agencies by the traditional common law writs of certiorari or prohibition, it was not long before it was apparent to the court that administrative law would go on, with or without the court, and unless the court were willing to modify its previous extreme position, it would be the court or the public and not the agencies which would suffer. Therefore, the suggestion in the *Whitten* case that the statutory "discretion" vested in statewide agencies might be confined within "legal limits" by the use of the writ of mandamus was clarified and adopted as the most graceful method of retreating from an untenable position. By 1939, the court was again ready to recognize the authority vested by the Legislature in the statewide agen-

[5] Standard Oil Co. of Calif. v. State Bd. of Equalization, 6 Cal.2d 557, 59 P.2d 119 (1936), noted at 24 CALIF. L. REV. 501 (1936). See also the discussions of the cases in the materials cited in notes 3 and 4 *supra*.

[6] See CAL. CODE CIV. PROC. §§ 1067–77. The writ of certiorari is called a "writ of review." This departure from previous holdings, although tacitly made by the court, is aptly described in Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California*, 29 CALIF. L. REV. 275 (1941).

[7] Whitten v. State Bd. of Optometry, 8 Cal.2d 444, 65 P.2d 1296 (1937) (holding that a writ of prohibition will lie only to restrain a threatened exercise of judicial power in excess of jurisdiction and cannot be used to review acts of a non-judicial administrative agency).

[8] The parallel between the hostility on the part of the California Supreme Court to administrative agencies and the hostility of the United States Supreme Court to similar agencies on the federal level during the same period is obvious. Later reliance by the California Supreme Court upon such federal cases as Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920), and St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1936), to support its conservative view was both misplaced and unrealistic. Nevertheless the rule of the *Standard Oil* case has survived by a justice or two ever since. *Cf.* Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, 280 P.2d 1 (1955).

cies, and held in *Drummey v. Board of Funeral Directors*[9] that mandamus would lie to review the orders of such agencies, despite the fact that traditionally mandamus was available only to review nondiscretionary acts. Of course, the decisions of the statewide agencies admittedly involved a good deal of discretion under the statutory provisions administered by those agencies.

But this recognition by the court that mandamus was the proper *form* of review answered only half the question: Would the *scope of review* under mandamus be the same as it had been under certiorari? In other words, if the order of the statewide agency was supported by substantial evidence, would the court be required to affirm the order as it had previously held itself bound to do in the certiorari cases? In the *Drummey* case the court expressly rejected the substantial evidence rule previously used in the certiorari cases in California, on the federal level, and in many states, on the ground that holdings embodying the substantial evidence rule "are of no weight in jurisdictions like California where the boards do not, and constitutionally cannot, exercise judicial powers."[10] In defining the proper scope of review on mandamus the court said:[11]

> [W]e can see no escape from the conclusion that in such a proceeding the court . . . must weigh the evidence, and exercise its independent judgment on the facts, as well as on the law, if the complaining party is to be accorded his constitutional rights . . . .

There was thus born the "independent judgment" scope of review coupled with a somewhat dichotomous declaration on the part of the court that the administrative findings of fact would come before the reviewing court "with a strong presumption of their correctness."[12] As McGovney queried at the time, "Just how the trial court is to reconcile this 'strong presumption' with the injunction that it 'must weigh the evidence, and exercise its independent judgment on the facts,' is not clear . . . ."[13] Nevertheless, the retreat from *Standard Oil* was by now well under way.

In *McDonough v. Goodcell*[14] the retreat was furthered by a holding

[9] 13 Cal.2d 75, 87 P.2d 848 (1939), noted 27 CALIF. L. REV. 738 (1939) (license revocation).

[10] *Id.* at 83, 87 P.2d at 853.

[11] *Id.* at 84, 87 P.2d at 853.

[12] In defining the court's function, the opinion said: "This does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort . . . . [I]n weighing the evidence the courts can and should be assisted by the findings of the board. The findings of the board come before the court with a strong presumption of their correctness, and the burden rests upon the complaining party to convince the court that the board's decision is contrary to the weight of the evidence." *Id.* at 85, 87 P.2d at 854.

[13] McGovney, *Administrative Decisions and Court Review Thereof, in California*, 29 CALIF. L. REV. 110, 130 (1941).

[14] 13 Cal.2d 741, 91 P.2d 1035 (1939).

by the court that a denial of an *application* for a license by a statewide agency did not involve an exercise of the judicial power, but merely an exercise of some executive-administrative function which did not have as its affect the taking away of some property or vested right as did license revocation. Therefore, in the denial of a privilege, the courts could interfere only where it was found that the administrator had "abused his discretion," and an abuse of discretion could be shown only where the administrative determination was not supported by substantial evidence. Thus, in the cases involving a denial of a license or the denial of some statutory benefit to which the applicant had no vested right, the independent judgment scope of review was inapplicable.[15]

However, in *Laisne v. Board of Optometry*[16] the conservative beachhead was revisited, and the court issued a decision phrased in such broad and sweeping terms as to virtually open a Pandora's box and release utter confusion into the law of judicial review of statewide administrative determinations where "rights" were involved. It will be recalled that in this group of cases, up to this time, while the court had said that the reviewing court must exercise an independent judgment on the facts, it was pretty clear that the court did not intend for the superior court to *retry* the case in the mandamus proceeding.[17] In the *Laisne* case the court held that not only was petitioner entitled to have the court exercise its independent judgment on the facts but that the superior court should conduct what would be in substance and effect a "trial de novo," in the course of which the parties would not be limited to the record made before the agency.[18]

Within a year, however, the court again retreated, pulling back as far as it could while still saving face. In *Dare v. Board of Medical Examiners*,[19] a license revocation case, the court held that the administrative record was "competent evidence" for the court to consider on mandamus and that that record "should be considered and weighed along with other evidence in the cause."[20] It was never contemplated, the court now declared, that the

[15] See discussion of problems in Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285 (1950). See note 27 *infra*.

[16] 19 Cal.2d 831, 123 P.2d 457 (1942) (license revocation). See the discussion of the case in Turrentine, *The Laisne Case—A Strange Chapter in Our State Jurisprudence*, 17 CALIF. S.B.J. 165 (1942), and McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies*, 15 So. CALIF. L. REV. 391 (1942).

[17] See note 12 *supra*.

[18] In Collier & Wallis, Ltd. v. Asta, 9 Cal.2d 202, 205, 70 P.2d 171, 173 (1937), Mr. Justice Curtis, who wrote the opinion in the *Laisne* case, defined a trial de novo saying: "It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if the previous hearing had never been held .... A hearing de novo therefore is nothing more nor less than a trial of the controverted matter by the court in which it is held."

[19] 21 Cal.2d 790, 136 P.2d 304 (1943), noted along with the *Laisne* case, 31 CALIF. L. REV. 436 (1943).

[20] 21 Cal.2d at 798, 136 P.2d at 308.

courts' time should be taken up with a mere reiteration of the evidence heard before the agency. The court was close to overruling the *Laisne* case trial de novo holding, but it did not do so in any startling fashion. What the court meant by a trial de novo was now defined to mean this: the administrative record should be received and considered by the court. In most cases, that record would constitute the record for purposes of review. But, if it should appear from that record that incompetent evidence had been received by the board, the court could throw it out on review and consider only the competent evidence in the record.[21] If the board had improperly refused to receive competent evidence, petitioner could offer it to the court. If newly discovered evidence, not available in the exercise of due diligence at the time of the administrative hearing, were offered, the court might receive it.[22] If the credibility of witnesses before the board was brought into question in the mandamus proceeding, the opportunity should be afforded for further examination of those witnesses for purposes of impeachment.[23] The *Laisne* case complete trial de novo was therefore supplanted by a limited authority in the reviewing court to augment the administrative record, which again was said to come before the court with a "strong presumption" of correctness.[24]

This extremely chaotic state of the law led the judges and the bar of the state to undertake studies of the problem.[25] The California Judicial Council issued its Report in 1944 calling for legislation on the subject of judicial review.[26] The result of their efforts was section 1094.5 of the Code

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[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] In his concurring and dissenting opinion, Mr. Justice Traynor observed: "The majority opinion is for the most part a retracing of the way back from the concept of a trial de novo that never materialized. It stops short of a complete retreat to review by certiorari of administrative decisions, by a guarded permission of new evidence in the court proceeding in rare circumstances, together with a provision that the superior court form an independent judgment on all the evidence. The attendant qualification that 'the findings of the board come before the court with a strong presumption of their correctness' suggests that the distinction between the new system and old may be more artificial than real." *Id.* at 809, 136 P.2d at 314. Justices Gibson and Edmunds concurred. Decided along with the *Dare* case was Russell v. Miller, 21 Cal.2d 817, 136 P.2d 318 (1943), where the reviewing court had struck from the record all the oral testimony given before the board. The supreme court held that it was error to strike, but that there was no showing of prejudice. See also, Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425 (1943) (superior court may rely solely upon administrative record in determining whether petitioner has made out a prima facie case for judicial review).

[25] A proposed constitutional amendment to alleviate the chaotic situation was presented to the voters and rejected. See Ryon, *Two State Bar Sponsored Amendments to Be on November 5 Election Ballot,* 15 CALIF. S.B.J. 294 (1940). Additional efforts of the bar are reflected in Note, 15 CALIF. S.B.J. 377 (1940). After the *Laisne* case, the bar's enthusiasm for a constitutional amendment waned. See, *e.g.,* Beauchi, *The Case Against S.C.A. Number 8,* 17 CALIF. S.B.J. 172 (1942); Browne, *Proposition 16 Should Be Defeated, id.* at 184.

[26] See note 1 *supra.*

of Civil Procedure, which in form and in essence is a codification of the *Dare* case. The only important respect in which the *Dare* definition of the proper procedure in the limited trial de novo cases differs from section 1094.5(d) is that the latter does not expressly make provision for the receipt of additional evidence by the reviewing court for purposes of impeachment. While it is regrettable that the Judicial Council did not recommend re-establishment of the substantial evidence rule, in view of the dubious but nonetheless controlling principles of constitutional law announced in the *Standard* and *Drummey* cases, there was probably little more that either the Council could recommend or the Legislature could enact constitutionally.

In view of this judicial-legislative history of section 1094.5, it might be thought that the ghost of the *Laisne* case trial de novo would have ceased to haunt the law of judicial review in California; but an examination of the most recent advance sheets will disclose that the doctrine of the *Laisne* case enjoys a lively limbo.

II

1946–1956: SECTION 1094.5(d) IN OPERATION

A.

Applicability

What statewide administrative actions fall within that class of cases where the reviewing court will exercise an independent judgment on the facts and, in proper cases, allow the administrative record to be augmented by additional evidence? The code merely states that where the court is "authorized by law to exercise its independent judgment," the limited trial de novo rules shall apply, but it does not define what "law" one is to use to determine whether or not a particular case is within the rule. The answer seems to be that the code has reference to decisions of those administrative agencies which, under the rule of the *Standard Oil* case, as qualified by later decisions,[27] cannot exercise even quasi-judicial powers. Into this group fall

[27] The rule of the *Standard Oil* case is inapplicable to (1) statewide agencies in cases of application for privileges or benefits, McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035 (1939); (2) statewide agencies deriving their judicial powers from the California Constitution, Covert v. State Bd. of Equalization, 29 Cal.2d 125, 173 P.2d 545 (1946), and (3) local agencies, Walker v. City of San Gabriel, 20 Cal.2d 879, 129 P.2d 349 (1942). See Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939–49*, 2 STAN. L. REV. 285 (1950). As Kleps indicates, there are a large number of agencies mentioned in the constitution whose precise status has not yet been determined. *Id.* at 293 n.30. In Transportation Bldg. Co. v. Daugherty, 74 Cal. App.2d 604, 169 P.2d 470 (1946), although the court appears to have exercised an independent judgment on the facts, the case seems to be more properly an application case and should have been decided under the substantial evidence rule. In a few cases involving judicial review of local administrative determinations the courts have permitted a

all statewide administrative agencies possessing statutory authority to deprive persons of some "vested interest."[28] The typical situation is one involving license revocation by a statewide agency[29] or one involving a denial by such an agency of certain statutory benefits the right to which has vested in the applicant.[30] Under the decision in the *Dare* case, and by virtue of the codification of the independent judgment principle in the code, both the constitutional and statutory minima for judicial review of such agency orders require that the courts have authority to substitute their judgments for those of the agencies where the courts cannot find that the agencies' decisions are supported by "the weight of the evidence."

B.

What Is Meant by a "Trial de Novo?"

In making the determination of whether the administrative order is supported by the weight of the evidence, the courts have authority under the code to augment the administrative record under certain circumstances. To what extent does the code permit a trial de novo? In the *St. Joseph Stockyards* case,[31] Chief Justice Hughes said: "Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency." That same philosophy surely underlies the code provision for judicial review of administrative determinations in California where the court is authorized by law to exercise an independent judgment on the facts, and here too, the review function of the superior courts is performed largely in the light of the proceedings already had on the administrative level. The "strong presumption" in favor of the correctness of those proceedings and the decision resulting therefrom bars any hope that the superior courts will grant any unlimited retrial of the cases in mandamus. Arguments supporting any such right have been rejected out of hand by the courts, and the *Laisne* case dicta

limited trial de novo. See, *e.g.*, Saks v. City of Beverly Hills, 107 Cal.App.2d 260, 237 P.2d 32 (1951). Such a procedure for local agency cases was expressly disapproved in Fascination, Inc. v. Hoover, 39 Cal.2d 260, 246 P.2d 656 (1952), and Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649 (1953). See Comment, *Judicial Review of Local Agency Determinations*, 29 So. CALIF. L. REV. .....(July 1956).

[28] See Drummey v. State Bd. of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848 (1939), noted 27 CALIF. L. REV. 738 (1939), 10 So. CALIF. L. REV. 341 (1936); Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20 (1948).

[29] *Ibid.* See also, Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304 (1943).

[30] See Thomas v. California Employment Stabilization Comm'n, 39 Cal.2d 501, 247 P.2d 561 (1952) (unemployment benefits); Ashdown v. State Dep't of Employment, 135 Cal. App.2d 291, 287 P.2d 176 (1955); Tringham v. State Bd. of Education, 137 Cal. App.2d 733, 290 P.2d 890 (1955) (teaching credentials).

[31] St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 53 (1936).

calling for a retrial in such cases must be regarded as overruled.[32] Yet, it is clear under the code and the cases that, given proper circumstances, there is a right to a limited trial de novo in the superior courts. Have the courts, in exercising these limited trial de novo powers, used those powers so extensively that "use has become abuse"? As some feared earlier, have the superior courts nullified the usefulness of the administrative agencies and supplanted the discretion vested in such agencies by the Legislature to the point that the agencies are little more than ex officio investigators for the courts?[33] The problem has two important facets. One will take us into an examination of the cases in which the courts have granted a limited trial de novo in the sense that they have permitted the introduction of new or additional evidence in the mandamus proceeding; the other will lead us into an analysis of the nature of the court's function when the court is exercising its independent judgment on the facts, with or without the introduction of new evidence in a limited trial de novo.

1. Augmenting the Administrative Record

In researching the case law for this article, a conscientious effort was made to read every case reported in California dealing with judicial review of statewide administrative agencies for the period from 1946 to 1956. In that period there were scores of cases in which, under the law, the court was required to exercise its independent judgment on the facts. In not a single case during that period was there anything even approaching an unlimited trial de novo given by the superior court.[34] In fact, I found only

[32] *E.g.*, Thomas v. California Employment Stabilization Comm'n, 39 Cal.2d 501, 247 P.2d 561 (1952); Asbdown v. State Dep't of Employment, 135 Cal. App.2d 291, 297, 287 P.2d 176, 180 (1955) ("The position of appellant's counsel with reference to a trial de novo is not clear. It seems that he is of the opinion that the court was required to hear all or part of the previous testimony and to receive additional evidence. Such a theory is not correct."); Mashburn v. Board of Funeral Directors, 132 Cal. App.2d 126, 281 P.2d 577 (1955); Chrysler v. California Employment Stabilization Comm'n, 116 Cal. App.2d 8, 253 P.2d 68 (1953); Marlo v. State Bd. of Medical Examiners, 112 Cal. App.2d 276, 246 P.2d 69 (1952); Manning v. Watson, 108 Cal. App.2d 705, 239 P.2d 688 (1952). In West Coast Improvement Co. v. Contractor's State License Bd., 72 Cal. App.2d 287, 299, 164 P.2d 811, 817-18 (1946), the court said: "If petitioner contends that he was entitled to an unlimited trial de novo and that the witnesses produced at the board hearing should be again called and re-examined as to facts about which they testified before the hearing officer, the petitioner is in error as to his rights . . . [for] it was never contemplated that the evidence presented to the board and contained in the record . . . should be reiterated before the court."

[33] See Turrentine, *The Laisne Case—A Strange Chapter in Our State Jurisprudence*, 17 CALIF. S.B.J. 165 (1942).

[34] This probably accounts for the lack of enthusiasm for any move to alter the status quo. The California Department of Professional and Vocational Standards, Division of Administrative Procedure, the natural group to be on the lookout for judicial usurpation of administrative functions, has not proposed any particular remedies in any specific form. However, that Division has said: "In general it is urged that a complete trial de novo should not be given by a reviewing court. To do so prevents the courts' being relieved from a growing burden of retrial of

four reported cases in which even a limited trial de novo was given under the code.[35] In all the scores of others, the reviewing courts considered only the record of the proceedings had before the administrative agency.[36] It will be helpful, in view of the sparsity of definitive cases, to review briefly the cases in which the court did permit some augmentation of the administrative record. The most recent such case is *Sautter v. Contractor's State License Bd.*[37] That case was a mandamus action to compel the board to restore petitioner's plumber's license which the board had revoked. At the trial in the superior court petitioner produced certain letters which his wife had discovered after the administrative hearing. These letters were in some old files which were stored in petitioner's garage and he alleged that he did not know of their existence at the time of the hearing before the board. These letters were offered for the purpose of impeaching certain testimony given before the board and to establish petitioner's good faith. The court ruled that the letters were admissible for purposes of impeachment. But it is important to note that the court found that the evidence could not, in the exercise of due diligence, have been produced at the administrative hearing. On appeal, the board contended that the lower court's action amounted to a "complete and unlimited trial de novo," violative of "the entire purpose of the legislation creating administrative agencies."[38] Nevertheless, the court held that the superior court did not commit error in receiving additional evidence. In so holding, the court expressly relied upon the *Dare* case rule that evidence offered for purposes of impeachment may be admitted and section 1094.5(d) of the Code of Civil Procedure providing that competent evidence which was not available in the exercise of due diligence at the time of the hearing may be admitted. The case seems to represent a clear holding by the court that despite the fact that section 1094.5(d) does not make provision for evidence offered for purposes of impeachment, such evidence is admissible under the rule of the *Dare* case.[39]

administrative hearings, constitutes a failure to give proper recognition to the expertness of administration in specialized fields as delegated by the Legislature, and it is unnecessary for a court to retry a factual issue after a qualified and experienced trier of fact has already tried, found and determined the relevant facts first hand after having had the opportunity to determine the credibility after confronting the witnesses." FOURTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 21 (1953).

[35] Pursuant to CAL. CODE CIV. PROC. § 1094.5(d).

[36] No useful purpose would be served by citing all the cases here. The cases cited in notes 30 and 32 *supra* are illustrative.

[37] 124 Cal. App.2d 149, 268 P.2d 139 (1954).

[38] *Id.* at 154, 268 P.2d at 142.

[39] In Tringham v. State Bd. of Education, 137 Cal. App.2d 733, 290 P.2d 890 (1955), the court held that it was error to sustain without leave to amend a demurrer to a petition for mandamus capable of being amended to state facts entitling petitioner to review of the Board's action revoking petitioner's teaching credentials. In its opinion the court said that if the credibility of witnesses before the Board is brought into question in a mandamus proceeding to review the Board's order, opportunity must be afforded petitioner to impeach such testimony. See, for discussion on credibility problem, notes 80 *et seq. infra* and text accompanying.

In *Grandi v. Watson,*[40] according to the report of the case on appeal, the matter was submitted to the superior court "upon the testimony and exhibits taken before a deputy Real Estate Commissioner and Hearing Officer, together with . . . short testimony by the Acting Real Estate Commissioner and one other witness."[41] While it is impossible to tell from the report of the case just what the nature of the testimony given in court was, it is clear that nothing that was said in the superior court materially affected the decision in the case. The entire decision seems to turn upon the question of whether the testimony showed "guilty knowledge" on petitioner's part, and although the testimony on the matter was in serious conflict, the board's order was held to be supported by the weight of the evidence given before the board. The court held that the weight to be given the testimony of the witnesses appearing before the board in such cases of conflict must be determined primarily by the trier of fact who heard and observed the witnesses. Both the superior court and the district court of appeal appear to have adherred to that rule even though the court was authorized by law to exercise its independent judgment on the facts.[42] Arguably, at least, such a rule would seem to be contrary to the court's holding in the previously discussed case where it was held that evidence may be admitted for purposes of impeachment on the trial level. If, however, the holding in the *Sautter* case is limited by the additional finding on the part of the court that the proffered evidence was not available under the due diligence rule, then the cases are distinguishable on the issue of credibility of witnesses.

In a third case, *Terminix Co. v. Contractors' State License Bd.,*[43] the court reviewed an order of the board suspending petitioner's license for violation of the Business and Professions Code.[44] The complaint of the board showed that petitioner was accused of unlawful conduct in the course of certain termite control work and in executing poor and excessively costly restucco work. The superior court, in addition to receiving the administrative record, received in evidence "one lone affidavit of a customer," a Mrs. B., who alleged that petitioner had refused to carry out certain oral promises made by petitioner's salesman. From the opinion on appeal it appears that this affidavit was *merely cumulative* of evidence given before the board. The superior court affirmed the board's order, finding that the weight of the evidence supported the board's decision. The district court of appeal reversed, but did so on the ground that the board's order and the court's affirmance of it were based upon an erroneous interpretation of the law.

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[40] 107 Cal. App.2d 395, 237 P.2d 73 (1951).

[41] *Id.* at 397, 237 P.2d at 74.

[42] See discussion, notes 80 *et seq. infra* and text accompanying.

[43] 84 Cal. App.2d 167, 190 P.2d 24 (1948).

[44] CAL. BUS. & PROF. CODE § 652.

Why the court admitted the customer's affidavit when it was cumulative in nature is hard to understand, unless it was shown that the evidence was not available at the time of the administrative hearing. The report of the case discloses no such facts. But the case is evidence of the fact that the agency, as well as the private litigant, may and sometimes does take advantage of the limited trial de novo rights under section 1094.5 of the Code.

Finally, in *Hohreiter v. Garrison*,[45] upon mandamus to review an order of the Insurance Commissioner revoking petitioner's agent's license, there was introduced in the superior court, "new evidence" by "both sides."[46] The only part of the new evidence mentioned by the appellate report was impeachment testimony on behalf of the licensee by two of his former employees, with whom he had been associated for ten years, to the effect that petitioner had a reputation for honesty and integrity.[47] The superior court affirmed the Commissioner's revocation order and the appellate court affirmed saying: "Appellant, in being given two complete trials, has been afforded more protection of his rights than is normally afforded a person accused of crime, who is legally entitled to but one trial."[48] Thus, while the appellate court did not think that the retrial of the case by the superior court was prejudicial, it is obvious from the opinion that the court went further than it was required to in permitting both sides to introduce additional evidence that was apparently cumulative in large part.

2. Suggested Procedure

Despite the fact that the reported cases indicate that the practice of permitting any augmentation of the administrative record upon judicial review represents the exception rather than the rule, nevertheless one might with good reason criticize the courts even in those rare cases where additional evidence is received. It does not appear that either under the court's decision in the *Dare* case or under the language of section 1094.5(d) of the Code of Civil Procedure the reviewing courts are *required* to hear such additional evidence. Even when such evidence is proffered as could be admitted under the code, there is no reason for believing that the court would commit prejudicial error by remanding the case to the agency for receipt and consideration of the evidence proffered so that the agency would have the opportunity to reconsider the entire matter in the light of the proffered and admissible evidence. The code merely provides that "the court *may* admit such evidence at the hearing on the writ without remanding the case."[49] Such language is permissive in nature and does not require the

[45] 81 Cal. App.2d 384, 184 P.2d 323 (1947).

[46] *Id.* at 387, 184 P.2d at 325.

[47] *Id.* at 391, 184 P.2d at 327.

[48] *Id.* at 402, 184 P.2d at 334.

[49] CAL. CODE CIV. PROC. § 1094.5(d). (Emphasis added.) Compare the substantial evidence rule cases; there the court is *required* to remand. *Ibid.*

court to act in a de novo capacity. It would seem that, except in the rare case where it is made to appear affirmatively in the record that the agency will refuse to comply with a court directive on the matter, the cases should be remanded to the agency wherever additional evidence is offered for any purpose specified in section 1094.5(d). Why should the superior courts take up their time hearing such additional evidence when the Legislature has established a forum for that very purpose?

As a practical matter, the courts do, on occasion, remand such cases to the agency for rehearing. In *Whitlow v. Board of Medical Examiners*[50] the court had before it a review of the board's revocation of petitioner's medical license. The court found that certain evidence proffered by petitioner had been erroneously excluded by the board at the administrative hearing. On review the superior court, instead of proceeding to hear that evidence de novo as it could have done under the code, remanded the case to the board for reconsideration and rehearing in the light of the court's ruling on the admissibility of the evidence.[51] On appeal the district court of appeal said that the trial court *could* have received the excluded evidence, but that it was not *compelled* to do so. This, coupled with the holdings by the California Supreme Court that there is no *right* to a writ of mandamus and that the trial court, in the exercise of its sound discretion, may deny the writ altogether,[52] makes it obvious that the court in the ordinary review case would not commit reversible error by remanding all such cases to the expert body created by the Legislature to do the very thing the court is asking it to do upon remand. Certainly the private litigant is not injured by such a procedure, since after the agency has reconsidered the case, he still has access to judicial review in which the court will exercise an independent judgment on the facts. Such a practice would, moreover, be more in line

[50] 128 Cal. App.2d 671, 276 P.2d 61 (1954).

[51] The superior court's order, Swain, J., said: "[T]he court's judgment herein shall not limit or control in any way the discretion legally vested in the Board." *Id.* at 674, 276 P.2d at 63. See CAL. CODE CIV. PROC. § 1094.5(e) which provides: "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." That it is difficult to reconcile this provision with the independent judgment and additional evidence provisions of subsections (c) and (d) is obvious, and it might be argued that subsection (e) is inapplicable to the independent judgment cases because subsection (d) refers to subsection (e) as stating what the court is to do in the substantial evidence rule cases. See, *e.g.*, Western Los Angeles Citizens Comm. v. State Bd. of Equalization, 111 Cal. App.2d 843, 245 P.2d 571 (1952) (remand in substantial evidence rule cases).

[52] See, *e.g.*, Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304 (1943); Sparks v. Board of Dental Examiners, 54 Cal. App.2d 491, 129 P.2d 405 (1942) (where additional testimony sought to be introduced is merely cumulative, trial court does not abuse its discretion in refusing it); Lahn v. Structural Pest Control Bd., 135 Cal.App.2d 289, 287 P.2d 17 (1955).

with the better practice of treating the superior courts as *reviewing* courts, and not as *trial* courts in these mandamus proceedings. It would also aid in dispelling the notion commonly held that there is a right to a "trial de novo" in the mandamus proceeding. Further analogy exists where the agency has proceeded improperly to the point that its decision is regarded as void for lack of jurisdiction (procedural due process). The superior court will not retry such a case on mandate.

In *National Automobile & Cas. Co. v. Downey*[53] the court was faced with just such a situation. There proceedings were begun against the licensee prior to the adoption of the California Administrative Procedure Act.[54] During the pendency of the proceeding, the act became law and it required that agencies subject to its provisions use hearing officers as provided for in the act to preside over cases of contested adjudication.[55] The evidence taken at petitioner's administrative hearing was not taken before such a hearing officer but by a Deputy Insurance Commissioner who was aided from time to time by a legal advisor. At the end of the hearing, the Deputy Commissioner recommended disciplinary action and his opinion was adopted by the Commissioner. Upon judicial review in the superior court, the licensee urged that he was entitled to a qualified hearing officer under the act, and the superior court agreed. The commissioner argued that the court itself should hold a trial de novo, that is, "should have received evidence and made findings as to the issues." This the court refused to do because it held that the agency had no jurisdiction, its proceedings were void, and in such a case there was nothing for the court to *review*. The court held that its function was not a *trial* function, but a *review* function. In affirming that action the district court of appeal said: "The determination of the issues should first be made by the administrative agency."[56] While the conclusion seems in line with by far the better practice, it is only fair to point out that the court's refusal to conduct a trial de novo was premised upon case authority, *Steen v. City of Los Angeles*,[57] which involved judicial review of a local administrative determination where there is no right to a limited trial de novo and the court is required by law to remand the case to the agency.[58] Nevertheless, the court's language in the case is appropriate in broader circumstances. The court said:[59]

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[53] 98 Cal. App.2d 586, 220 P.2d 962 (1950).

[54] CAL. GOVT. CODE § 11370 *et seq.*

[55] *Id.* § 11502. See also, Bartosh v. Board of Osteopathic Examiners, 82 Cal. App.2d 486, 186 P.2d 984 (1947) (qualified hearing officer required for procedural due process).

[56] Nat'l Automobile Cas. Co. v. Downey, 98 Cal. App.2d 586, 594, 220 P.2d 962, 967 (1950).

[57] 31 Cal.2d 542, 546, 190 P.2d 937 (1948).

[58] CAL. CODE CIV. PROC. § 1094.5(d).

[59] Nat'l Automobile Cas. Co. v. Downey, 98 Cal. App.2d 586, 594, 220 P.2d 962, 967 (1950).

> Where an administrative agency has not conducted a hearing properly, or has committed error of law, or if the evidence is insufficient to support the findings, and it is still possible under the circumstances for the agency to exercise its discretion, the court should remand the matter to the agency for further consideration.

It is extremely doubtful whether any case could come up where, under the *Dare* case or section 1094.5(d) of the Code of Civil Procedure, additional evidence would be admissible, that the circumstances could be such that it would not still be possible for the agency to act upon the matter on a hearing and reconsideration.

Further support for a narrow interpretation of section 1094.5(d) is found by way of analogy to the law governing the admission of new or additional evidence by the appellate courts in California in regular judicial appeals. Under section 956a of the Code of Civil Procedure, the appellate courts generally are authorized to make findings of fact based either upon the evidence adduced before the trial court or upon new evidence received by the appellate court. This power given the appellate courts to receive new or additional evidence permits them to receive evidence concerning facts occurring at any time prior to the decision of the appeal, and in receiving and using such evidence the appellate court may perform essentially the function of a trial court.[60] But this broad statutory power to conduct a kind of de novo hearing has never been literally applied by the California appellate courts; those courts have wisely refrained from embroiling themselves in trial functions. It cannot be overemphasized that this authority to receive additional evidence on appeal has been declared to be *wholly discretionary* with the appellate courts.[61] Moreover, it is clear that such evidence, when offered, must be accompanied by an affidavit stating the reasons why the evidence was not produced in the superior court.[62] It is also clear that evidence will not be admitted under section 956a which is merely cumulative or which would merely add to an already existing conflict in the evidence,[63] or which evidence could have, in the exercise of reasonable diligence, been produced at the trial of the case in the lower court.[64] And most

[60] CAL. CODE CIV. PROC. § 956a. See 3 WITKIN, CALIFORNIA PROCEDURE 2392 *et seq.* (1954). Section 956a was adopted pursuant to CAL. CONST. art. VI, § 4¾, abrogating the pre-1926 rule against receipt of new evidence by appellate courts.

[61] The leading case interpreting section 956a is Tupman v. Haberkern, 208 Cal. 256, 280 Pac. 970 (1929). See also, WITKIN, CALIFORNIA PROCEDURE § 198 (1954). See Rule 23(b) under CAL. CODE CIV. PROC. § 956a; Baker v. Ferrell, 78 Cal. App.2d 578, 580, 177 P.2d 973 (1947).

[62] *Ibid.*

[63] Helmer v. Helmer, 87 Cal. App.2d 682, 688, 197 P.2d 558, 562 (1948); Grove v. Lewis, 125 Cal. App. 357, 362, 13 P.2d 847, 849 (1932); Bauer v. Bauer, 38 Cal. App.2d 309, 317, 100 P.2d 1070, 1072 (1940).

[64] *Ibid.* See also cases cited note 61 *supra.*

significantly, as the section has been interpreted it does not permit the appellate courts to receive such evidence solely for the purpose of reversing the lower court; such evidence may be admitted only where it will permit the court to affirm or to determine what directions should be given to the lower court in a reconsideration by the lower court of the particular case.[65]

Why should the time of the superior courts in exercising a *review* function be taken up with hearing evidence which, if the same were presented to any other reviewing court, would result in a remand of the case? And should it make any difference that under a literal reading of section 956a of the Code the appellate court *could* receive such evidence? Clearly, the superior courts, insofar as they serve as a check upon administrative discretion in mandamus proceedings, should enjoy the same freedom of action which other appellate courts in the state enjoy. Again, were the superior courts to adopt the same narrow interpretation of section 1094.5(d) as the appellate courts have adopted with respect to section 956a, the *review* nature of the courts' function would be more clearly established and the common belief in some right to a "trial de novo" would be dispelled.

This recommended procedure would in no sense impair the ability of the superior courts to exercise an independent judgment upon the record in an ultimate review proceeding *after* the agency had been given the opportunity to perform its rightful function as the trier of fact. The state Division of Administrative Procedure has taken the position that such a method of handling the cases would be proper. In its *Fourth Biennial Report,* the Division said:[66]

> It is . . . urged that the power of the superior court in reviewing the record on petition for writ of mandate under Code of Civil Procedure 1094.5 should be restricted in the event an offer is made of additional evidence, and that the case should be remanded to the agency for further consideration of such new or additional evidence.

III

SECTION 1094.5(c) IN OPERATION: AN "INDEPENDENT JUDGMENT" ON THE FACTS

Since so few of the cases coming before the superior courts for review have required the court to do anything more than review the administrative record, the question of what the exercise of an "independent judgment"

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[65] See, *e.g.,* Tupman v. Haberkern, 208 Cal. 256, 280 Pac. 970 (1929); Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695 (1950). Somewhat the same practice and limiting rules have been applied in certiorari proceedings. See Wilde v. Superior Court, 53 Cal. App.2d 168, 127 P.2d 560 (1942); Triplett v. Superior Court, 57 Cal. App.2d 563, 135 P.2d 4 (1943).

[66] FOURTH BIENNIAL REPORT, DIVISION OF ADMINISTRATIVE PROCEDURE 21 (1953).

with respect to a record made entirely by the agency means is the most important question in this area of judicial review. What is the difference, in terms of scope of review and authority of the reviewing court, between cases in which the court is authorized to exercise an independent judgment on the facts and cases in which the court determines merely whether or not the administrative determination is supported by substantial evidence in the light of the whole record?[67] If one is to believe what the courts say that they do under the substantial evidence rule, the difference would seem significant. In the independent judgment cases the code provides that the courts shall determine whether the administrative order is supported by the weight of the evidence. The theoretical distinction between the two standards for scope of review is well recognized by the courts. For example, it is common for the courts in California to say that, when review is governed by the substantial evidence rule, the only question before the court is "whether the evidence, viewed in the light most favorable to [the party prevailing in the lower court], sustained the findings of the trial court . . . ."[68] Under such a rule the court may not reweigh the evidence; it has been stated many times by our appellate courts that all conflicts in the evidence must be resolved in support of the trial court's findings,[69] and that evidence contrary to the findings of the trial court may be *disregarded* in determining whether or not the evidence supporting the trial court's determination is "substantial."[70] In short, the appellate courts applying the substantial evidence rule are not concerned with the correctness of the trial court's findings; they are concerned only with the reasonableness of those findings.[71] In many cases the operational and evidentiary facts in the record would support ultimate findings of fact either way, depending in many cases upon which testimony given before the trier of fact was believed to be true and which testimony was rejected as false. Since reasonable men might well

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[67] See Netterville, *The Substituted Evidence Rule in California Administrative Law,* 8 STAN. L. REV. .....(1956). See also, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951).

[68] Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20 (1948), noted at 1 STAN. L. REV. 326 (1949) and 22 So. CALIF. L. REV. 49 (1948).

[69] See Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649 (1953). But compare the opinion of the district court of appeal in the case, 250 P.2d 312 (1953). See also Penaat v. Zeiss, 97 Cal. App.2d 909, 912, 219 P.2d 60, 62 (1950), where the court said: "We have said that the evidence supports the several accusations because respondents have pointed to evidence sufficient for that purpose. We have not read the transcript of the proceeding before the board to see if there might be a conflict, and it is not our duty to do so." *Accord,* Bohn v. Watson, 130 Cal. App.2d 24, 28, 278 P.2d 454 (1954).

[70] *Ibid.* The broad application of the substantial evidence rule to all judicial review of trial court decisions is well discussed in 3 WITKIN, CALIFORNIA PROCEDURE 2243–53 (1954).

[71] *Ibid.* See also Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 56 HARV. L. REV. 899 (1943).

differ on the credibility question and upon the inferences which might be drawn from the evidence given, the courts, under the substantial evidence rule, will affirm the findings of the lower tribunal if they have reasonable support in the record.[72] This rule takes into account the presumably better position of the trier of fact to pass upon the worth of the evidence having observed the demeanor of the witnesses, the expert knowledge of the trier of fact in administrative proceedings, and the practical considerations which call for a separation of functions between trial and appellate courts. It is only when the findings of the trial court or the administrative agency bear no reasonable relation to the basic evidence in the record that the appellate court, under the substantial evidence rule, will declare an abuse of discretion.[73]

But in cases where the court is authorized by law to exercise an independent judgment on the facts, presumably it is the duty of the court to determine not only the reasonableness of the agency's action, but also its correctness. For all practical purposes, the court is authorized to stand in the shoes of the trier of fact, even though its function is appellate in form. The court theoretically must decide the case as though the prior decision had not been made at all, despite the fact that the court performs that function in the light of evidence taken by the agency rather than the court. Arguably, anything short of such a review procedure would not amount to an "independent judgment." But it must be recalled that the use of the "independent judgment" language in the code resulted from the *Dare* case, where the court admonished the superior courts to keep in mind that the administrative decision comes before the court with a "strong presumption" in its favor. Moreover, our appellate courts have said that the duty of the superior court is merely to determine whether the administrative decision is supported by the weight of the evidence, even though the superior court might have decided the case differently had that court had the case before it de novo.[74] I confess that I do not see how it is possible for a court to find (a) that the administrative decision is supported by the weight of the evidence, but (b) the court would not so find if it were trying the case de novo. The two notions seem to me to be wholly incompatible. Either the court may exercise an independent judgment or it may not; the code says it may, and while one may disagree with the propriety of that function upon review, it does not aid the matter by seeking to escape its meaning by sur-

[72] Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20 (1948). See also Comment, 40 CALIF. L. REV. 119 (1952), discussing the substantial evidence rule in the Industrial Accident Commission cases.

[73] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649 (1953).

[74] Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20 (1948).

rounding the rule with incompatible judicial declarations as to its meaning. It would seem to me that when a statute provides for an exercise of an independent judgment based upon a determination of where the weight of the evidence lies in the case, the court must be free to determine both qualitatively and quantitatively the weight it would give to the evidence, regardless of the fact that the weight given the evidence by someone else would be considered fair by reasonable men and supportable under the substantial evidence rule.[75] It is obvious that the Legislature intended that the courts have broader review powers in the statewide agency "rights" cases than in the other types of administrative cases where the substantial evidence rule was made applicable. Most lawyers and judges perceive, conceptually at least, a difference in degree of scope when the statute permits an independent judgment to determine the weight of the evidence and when it permits merely a determination of whether the order is supported by substantial evidence, even though they would be hard put to state the distinctions clearly and concisely. But the distinctions become extremely blurred when the independent judgment authority is beclouded by a presumption in favor of a prior determination of the issues. It seems clear that when the courts have qualified the independent judgment rule by the "strong presumption" in favor of the administrative determination, they have been attempting to retreat from the *Standard Oil* decision without expressly saying so.[76] They have attempted to make the independent judgment cases as much like the substantial evidence rule cases as possible without appearing to fly in the face of the requirements of *Standard Oil,* as now reflected in section 1094.5(c) and (d) of the Code of Civil Procedure.

This theoretical divergence as to the meaning of the independent judgment rule is enlightening as an indication of judicial dissatisfaction with the rule, but it may have as its ultimate effect an unhealthy divergence with respect to the practice of the superior courts on judicial review. Whether one believes that we ought to follow the broad or the narrow meaning of the term, I think all would agree that the courts should all follow the same rule and apply the same meaning of that rule. If any other system prevailed, we would be forced to agree with Ehrlich that "there is no guaranty of justice save the personality of the judge."[77]

A.

The Independent Judgment Rule in Practice: Credibility of Witnesses

Judicial experience with the independent judgment rule over the past ten years may give us some insight into the answer of the interpretation

[75] See the dissent of Mr. Justice Traynor, Moran v. Board of Medical Examiners, 32 Cal.2d 301, 315, 196 P.2d 20, 29 (1948).

[76] *Ibid.* See also note 24 *supra.*

[77] Ehrlich, *Judicial Freedom of Decision: Its Principles and Objects,* THE SCIENCE OF LEGAL METHOD 65 (1921).

question just posed. If the courts are assuming the functions of a trier of fact upon judicial review, then we may reasonably conclude that the independent judgment rule means in practice just what its name implies, a kind of de novo decision based upon an independent reweighing of the facts in the case. If, on the other hand, the superior courts are performing their functions more in line with rules of appellate practice, there would be grounds supposing that the difference in scope of review between the substantial evidence rule cases and the independent judgment cases is more apparent than real.

In many of the license disciplinary cases coming before the superior courts for review the ultimate decision in the case will, in the nature of the acts charged against petitioner, involve a weighing and an evaluation of the testimony of opposing witnesses. Much dogma in our appellate jurisprudence is substantially in support of the proposition that where the issues in a case turn upon the credibility of witnesses, the appellate courts will not interfere with the trial court's determination of those issues unless the trial court's determinaion has absolutely no basis in the record or is "inherently improbable."[78] This rule of appellate jurisdiction is based upon the premise that the one who hears and observes the demeanor of the witnesses is in the best position to evaluate the worth of the testimony given by the witnesses, and that an appellate court, faced only with the "cold record," should not presume to exercise that function.[79] Do the superior courts upon review of a statewide administrative determination involving rights consider themselves limited by this rule of appellate jurisdiction? Or, do the superior courts view their function as one more analogous to that of a trier of fact who, in the normal case, would make those determinations? Suppose that, as is the usual case, the superior court has before it only the "cold record," and that it has not seen or heard any of the witnesses whose credibility it is asked to judge.

The cases are multitude in which the superior courts, having before them only the cold record, have chosen to believe testimony that was rejected as not worthy of verity by the hearing officer who heard the case

[78] See, *e.g.*, Hubbert v. Industrial Accident Comm'n, 14 Cal. App.2d 171, 58 P.2d 171 (1936). In non-administrative law cases, see Dunaway v. Anderson, 22 Cal. App. 691, 694, 136 Pac. 309 (1913); Cummings v. Kendall, 41 Cal. App.2d 549, 555, 107 P.2d 282 (1940); Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689 (1943). See also, the language of the United States Supreme Court in the first review of NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949), where the findings of the trial examiner were attacked for bias because he had in nearly all cases given credit to the board's witnesses and discredited the companies' witnesses. In accepting the findings on credibility the Court said: "Suffice it to say in this case that our attention has been called to no credited testimony which 'carries its own death wound,' and to none discredited which 'carries its own irrefutable truth.'" *Id.* at 660.

[79] See Maslow v. Maslow, 117 Cal. App.2d 237, 255 P.2d 65 (1953); Schouten v. Crawford, 118 Cal. App. 2d 59, 257 P.2d 88 (1953).

and observed the demeanor of those witnesses, without the courts' calling those witnesses before them for testimony. For example, in *Tamble v. Downey*[80] the superior court annulled an order of the Insurance Commissioner revoking petitioner's license. The annullment was clearly based upon the fact that, upon review of the cold record, the court accepted as true certain testimony of the petitioner given before, but rejected by, the agency. The appellate court affirmed the superior court's action saying that where an independent judgment is exercised by the superior court upon conflicting evidence, "the findings of the trial court are necessarily conclusive on appeal."[81] Such a holding is somewhat illogical and predicated, apparently, upon the mistaken belief that the same rationale for the rule which exists when the appellate court is reviewing a trial court's decision is applicable when the appellate court is reviewing a superior court's *review* of an administrative determination. In the former, of course, the trial court observed the witnesses; in the latter it did not. Nevertheless, the number of cases which rely upon the mistaken belief that the review functions of the superior court are the same as the trial functions of that court are so numerous that, despite the fact that they all miss the real questions involved, they have established a rule for the credibility questions which places wide authority in the superior courts.[82] These decisions make it plain that it is proper for the superior court to substitute its judgment for that of the real trier of fact, the hearing officer, even though the usual rules of appellate practice would not permit them to do so.[83]

There is, however, a minority view prevalent in some of the cases. For example, in *Kendall v. Board of Osteopathic Examiners*[84] the appellate

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[80] 104 Cal. App.2d 810, 232 P.2d 543 (1951).

[81] *Id.* at 812, 232 P.2d at 544.

[82] That such a procedure is proper is, of course, the clear import of Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304 (1943). See in support of the rule: Bohn v. Watson, 130 Cal. App.2d 24, 278 P.2d 454 (1954); Ohanesian v. Watson, 118 Cal. App.2d 386, 257 P.2d 1022 (1953); Marks v. Watson, 112 Cal. App.2d 196, 245 P.2d 1121 (1952); Cooper v. Board of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630 (1950); Bogart v. Board of Medical Examiners, 105 Cal. App.2d 250, 233 P.2d 100 (1951) ("Any conflict in testimony was a matter to be initially determined by the board, and once again by the trial judge.")

"Although the doctrine is often expressed that a reviewing court should not substitute its judgment for that of the trier of fact, nevertheless for reasons which at times appear obscure some Superior Courts without having heard any testimony and having available only the cold written record . . . , have, in their independent consideration of the record, ignored those factors which may have persuaded the finder of fact, who observed the demeanor of the witnesses on the stand, and made findings contrary to those made by the agency through its adoption of the decision proposed by a trained hearing officer." Clarkson, *Administrative Law & Procedure,* 4 SURVEY CALIFORNIA LAW 17 (1952).

[83] See note 77 *supra.*

[84] 105 Cal. App.2d 239, 233 P.2d 107 (1951). See also Stillman Pond, Inc. v. Watson, 115 Cal. App.2d 440, 252 P.2d 717 (1953); Grandi v. Watson, 107 Cal. App.2d 395, 237 P.2d 73 (1951), discussed in note 39 *supra.*

court treated the superior court's function as appellate, rather than trial, in nature. Petitioner contended that the board had abused its discretion in accepting the testimony of certain witnesses who testified against petitioner and rejecting certain testimony given in his favor. On this point the appellate court said:[85]

> [T]he board saw the witnesses. Their credibility was for the board to determine, not for us. There was nothing inherently improbable in [W's] testimony.

This view of the superior court's function is in line with the more limited review authority obtaining under the substantial evidence rule.[86] The main difficulty with accepting the rule of the *Kendall* case would be that it would create a type of review function that requires the court to give due account to the fact that the trier of fact observed the demeanor of the witnesses thus creating an inhibition upon the independency of the judgment seemingly required of the court under the code.

These cases make it clear that there is no agreement among the district courts of appeal as to the proper scope of the superior court's inquiry in cases where the ultimate decision will turn upon the question of credibility of witnesses. There can be little doubt that the reason for the rule requiring appellate courts to accept the findings of the trier of fact on such questions is as applicable to judicial review of administrative determinations as it is to judicial review of trial court determinations, with one exception. Under the California Administrative Procedure Act[87] the agency itself is permitted to disregard the findings of fact made by the hearing officer in the case, and is free to substitute its judgment for that of the hearing officer even on questions involving the credibility of witnesses without itself having heard any of the testimony.[88] In that group of cases where the agency so acts, the rationale for the rule is lacking, and there seems little reason why the superior courts or the appellate courts generally should consider that credibility questions involve any special competence on the part of the

[85] Kendall v. Board of Osteopathic Examiners, 105 Cal. App.2d 239, 245, 233 P.2d 107, 109 (1951).

[86] See cases cited in notes 68–78 *supra*.

[87] CAL. GOVT. CODE § 11517(c).

[88] See Leeds v. Gray, 109 Cal. App.2d 874, 242 P.2d 48 (1952); Cooper v. Board of Pub. Health, 102 Cal. App.2d 926, 229 P.2d 27 (1951). Although the law on the subject is not crystal clear, there is undoubtedly some limitation upon the agency's power to disregard the trial examiner's findings on credibility at the federal level. *Compare* Allentown Broadcasting Corp. v. FCC, 349 U.S. 364 (1955), with United States *ex rel.* Brzovich v. Holton, 222 F.2d 840 (7th Cir. 1955). The recent Hoover Commission Task Force recommended that agencies be limited in authority to overrule the trial examiners to the same extent that courts are limited under the substantial evidence rule. See COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 204 (1955). See also *Symposium*, 30 N.Y.U.L. REV. 1267, 1356 (1955).

agency-trier-of-fact which did not observe the demeanor of the witnesses. Experience shows that in the disciplinary cases subject to the independent judgment rule, there are fewer instances where the agency does not follow the hearing officer's recommendations or findings of fact, so that the usual appellate rule has fair application in all but rare instances.[89] Certainly, if the appellate rule makes sense at all, it makes as much sense in the independent judgment cases as it does in the substantial evidence rule cases, for in both areas the cases are heard by a hearing officer appointed subject to the Administrative Procedure Act; a qualified and trained trier of facts has thus presided at the hearing, observed the witnesses and made findings of fact based on his unique familiarity with the case.[90] Under such circumstances, I would recommend that the superior courts adopt the appellate rule on credibility with one important admonition, expressed on the federal level by Mr. Justice Frankfurter in the *Universal Camera* case.[91] In that case, although he was speaking of the proper function of the reviewing courts under the substantial evidence rule, he said that the courts must set aside the findings of the administrative agency " . . . when the record before the Court . . . clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses . . . ."[92] Certainly, if the courts, under the narrow scope of review permitted by the substantial evidence rule, must consider the worth of the testimony of the witnesses, courts which are required to exercise an independent judgment on the facts must do so. But the requirement is not one under which the court is free to act by whim or suspicion, but one under which, even by giving due recognition to the better position of the trier of fact to make the determination by reason of his having heard and observed the witnesses, the court finds an obvious lack of impartiality on the part of the trier of fact in making such findings. In the license suspension and revocation cases, which by their nature are punitive in effect and a good deal like criminal prosecutions, the arguments supporting this broader scope of review on questions of credibility are particularly persuasive.[93] The superior courts can exercise that broader review without completely ignoring the findings made on those issues by the agency and without usurping the trial functions of those agencies.

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[89] See cases cited in note 84 *supra*.

[90] See comments by Clarkson, *Administrative Law & Procedure*, 4 SURVEY CALIFORNIA LAW 17 (1952).

[91] Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). See Jaffe, *Judicial Review: "Substantial Evidence on the Whole Record,"* 64 HARV. L. REV. 1233 (1951).

[92] Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

[93] The courts often speak of the revocation as being punitive. See, *e.g.*, Cooper v. Board of Medical Examiners, 35 Cal.2d 242, 217 P.2d 630 (1950); Nelson v. Dep't of Correction, 110 Cal. App.2d 331, 242 P.2d 906 (1952); Jones v. Maloney, 106 Cal. App.2d 80, 234 P.2d 666 (1951). See also Stoumen v. Reilly, 37 Cal.2d 713, 717, 234 P.2d 969, 971–72 (1951).

The only reasonably possible alternative I can see is for the superior courts to recall those witnesses whose testimony is sought to be impeached and to permit the petitioner to call his witnesses for purposes of impeachment. Such a practice would, of course, entail a good deal more time and effort on the part of the superior courts and result in additional "limited trials de novo." That fact alone detracts substantially from the usefulness of this alternative. There are cases, of course, where the court has called witnesses on issues of credibility,[94] and cases where the court has said that such a practice is proper.[95] There seems little doubt that the practice is justifiable under the *Dare* case which would permit the calling of witnesses for purposes of impeachment. However on balance, it would seem that the superior courts will perform their functions best by accepting the hearing officer's findings on issues involving credibility of witnesses if his findings are fairly supported on the whole record.

Aside from the questions upon review which involve credibility of witnesses, there are two other types of questions which have served to indicate the independent nature of the superior court's review of statewide administrative actions. One has to do with review of administrative discretion and the other has to do with the question of penalties. Because of the importance of those two matters, they will be treated separately here.

B.

Administrative Discretion

It would be difficult to think of a word in administrative law more used and misused than the word "discretion." It will be well, therefore, to attempt some definition of the word as it is used here, regardless of its other possible uses and meanings. By discretion I mean that freedom of choice from among a number of possible and reasonable choices available to the agency in achieving a determination in a given case. For example, when an agency is authorized to suspend or revoke a license on the ground that the holder of the license has been guilty of fraud or other misconduct, in giving meaning to those broad terms there is called into play a large number of relevant considerations and a choice from among those possible considerations may throw the decision in the case one way or another. In most cases there is no special statutory rule, administrative regulation or prior judicial decision making the precise conduct charged against the licensee unlawful.

[94] See Grandi v. Watson, 107 Cal. App.2d 395, 237 P.2d 73 (1951); Terminix Co. v. Contractor's State License Board, 84 Cal. App.2d 167, 190 P.2d 24 (1948); Hohreiter v. Garrison, 81 Cal. App.2d 384, 184 P.2d 323 (1947). See also Wyatt v. Cerf, 64 Cal. App.2d 732, 149 P.2d 309 (1944), which, although decided prior to the enactment of the code, permitted the calling of witnesses where credibility was in issue.

[95] See Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304 (1943); Tringham v. State Board of Education, 137 Cal. App.2d 733, 290 P.2d 890 (1955).

The decision in the instant case will permit a certain freedom of choice from among several possible interpretations both of the facts as found and the law. Under the substantial evidence rule, if the agency's choice is a reasonable one the court will normally affirm. Do the courts which exercise an independent judgment on the facts as well as the law follow the same "rational basis" test?[96] From a reading of a fair cross-section of judicial opinions involving review of orders under the independent judgment rule, it is clear that the courts have not found it necessary to label the problems presented on review as "questions of fact" or "questions of law," and the obscuring that is inherent in any such labeling has been avoided in these cases. This is probably true for several reasons. In the first place, the cases involve predominantly disciplinary proceedings in which the courts generally feel as competent as the agency in interpreting the facts and the statute. Second, even in the non-disciplinary cases the agencies do not deal in such highly technical data as do agencies like the Public Utilities Commission when regulating public transportation, etc. There is an obvious belief in the courts that for the most part the discretion vested in the agencies is relatively narrow. For example, in *Thomas v. California Employment Stabilization Comm'n* the court said:[97]

> The determination of the exact amounts due is essentially a mathematical and mechanical process, and the administrative authorities have no discretion to withhold benefits from any particular claimant once it is determined that the facts support his claim . . . . Benefit claims . . . are not comparable to applications for business and professional licenses.

The result of these various factors is that the statewide agencies subjected to the independent judgment rule find themselves with rather circumscribed authority to interpret and apply their statutes to the facts. It is pretty clear that the courts exercise a free hand in making their own independent interpretation of the statutes involved,[98] despite the fact that in the substantial

[96] The so-called "rational basis" test grew out of cases like Gray v. Powell, 314 U.S. 402 (1941) and NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). Under this test, on questions of statutory interpretation and application, the administrative determination must be affirmed if it has warrant in the record and represents a reasonable interpretation and application of the broad statutory terms. See Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955); Schwartz, *Gray v. Powell and the Scope of Review*, 54 MICH. L. REV. 1 (1955). It has been said that the doctrine of those cases is a part of California's jurisprudence. See, *e.g.*, Coborn v. Industrial Accident Comm'n, 31 Cal.2d 713, 718, 192 P.2d 959, 962 (1948); 2 CAL. JUR.2d, *Administrative Law* § 226 (1952). There is not, however, any particular consistency in the application of the test. See, *e.g.*, Reinert v. Industrial Accident Comm'n, 46 A.C. 347 (1956); Bertch v. Social Welfare Dep't, 45 Cal.2d 524, 289 P.2d 485 (1955); Samuelson v. Public Util. Comm'n, 36 Cal.2d 722, 227 P.2d 256 (1951). See Netterville, *Judicial Review of Questions of Law*, 29 So. CALIF. L. REV. .....(July 1956).

[97] 39 Cal.2d 501, 504, 247 P.2d 561, 562 (1952).

[98] See, *e.g.*, Sautter v. Contractor's State License Bd., 124 Cal. App.2d 149, 268 P.2d 139 (1954) (relevancy of petitioner's state of mind); Terminix Co. v. Contractor's State License Bd., 84 Cal. App.2d 167, 190 P.2d 24 (1948) (agency "misunderstanding of statute"); Chrysler

evidence rule cases the courts have repeatedly held that the administrative interpretation of the broad statutory language will be upheld if it is reasonable and has factual support in the record. The one outstanding exception to this freedom on the part of the superior courts to exercise an independent judgment on questions of statutory interpretation seems to be the case of *Rattray v. Scudder*.[99] There the Real Estate Commissioner found that petitioner had engaged in acts which constituted a violation of the statute giving grounds for revocation of his license. Upon the facts the superior court reversed, finding as a matter of law that petitioner's acts did not amount to fraud or misconduct under the statute. The California Supreme Court, speaking through Mr. Justice Traynor, held that the trial court's interpretation of the statute was too narrow and that the interpretation made by the agency was a reasonable one, supported by the facts in the record.[100]

The process by which the courts have interpreted the disciplinary statutes, that is, by using common law analogies to the law of agency, crimes, torts, etc., has had as its over-all effect a narrowing of the broad statutory language and a consequent narrowing of the discretion which *could* have existed for the administering agencies had they been given as free a hand in terms of statutory interpretation as the United States Supreme Court permitted in the famous *Chenery* case.[101] This broad authority held by the courts somewhat tacitly in the independent judgment cases where the courts do not feel compelled to distinguish between fact and law, coupled with the authority discussed above with respect to issues involving credibility of witnesses, would appear to leave little discretion with the agencies in the license revocation cases.

C.

Review of Penalties

It is commonplace in administrative law to read that the imposition of the penalty is, within reasonable bounds, a matter wholly within the discretion of the agency, both as to whether or not any penalty shall be imposed and as to the degree of that penalty where it has been determined that some penalty is called for. Does the fact that the superior courts are authorized to exercise an independent judgment on review of the adminis-

v. California Employment Stabilization Comm'n, 116 Cal. App.2d 8, 253 P.2d 68 (1953) (interpretation); Barber v. California Employment Stabilization Comm'n, 130 Cal. App.2d 7, 278 P.2d 762 (1954) (same). *But see* Meyer v. State Bd. of Equalization, 34 Cal.2d 62, 206 P.2d 1085 (1949) (administrative interpretation reasonable and accepted by court).

[99] 28 Cal.2d 214, 169 P.2d 371 (1946).

[100] See also his dissent in Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20 (1948).

[101] SEC v. Chenery Corp., 332 U.S. 194 (1947), noted at 62 HARV. L. REV. 478 (1949), 36 CALIF. L. REV. 619 (1948).

trative determination give the court the power to determine all questions involved in the imposition and degree of the penalty? Until recently a great deal of dispute and disagreement existed as to the proper function of the courts in such matters.

In *Bonham v. McConnell*[102] the California Supreme Court clarified some of the questions arising in this area. In the *Bonham* case the Insurance Commissioner had revoked petitioner's license to act as an insurance agent upon making fifteen findings that Bonham was guilty of wilfully inserting false answers in applications for insurance and knowingly misrepresenting the nature and terms of the policies he was offering. The superior court, after reviewing the record and exercising its independent judgment on the evidence, found that three of the fifteen charges were not supported on the record, but held that the other twelve were supported and concluded that those charges were in and of themselves sufficient to sustain the action taken by the Commissioner. Petitioner, claiming that the court should have remanded the case to the agency for a reconsideration of the penalty in the light of the court's findings, appealed. The district court of appeal held that the superior court was right in not remanding the case.[103] The California Supreme Court reversed, holding that the case should be remanded to the agency for reconsideration of the penalty.

At the time of the decision the law was by no means clear on the proper procedure to be followed in such cases. Prior to the enactment of section 1094.5 of the Code of Civil Procedure, it had been held that on either certiorari or mandamus the courts were limited to determining whether the administrative agency had exceeded its jurisdiction and in those cases it was generally held that the administrative penalty imposed had to be affirmed no matter how drastic it might appear to the court provided there was *any* support for the penalty in the findings which the court found supported.[104] In *Rinker v. Board of Medical Examiners*[105] petitioner had been charged with two counts of unprofessional conduct involving abortions. The appellate court found that the evidence was sufficient to sustain one count, and in denying the petition for a writ of mandate, held that it was not necessary to consider the evidence on the other count because "if the evidence is sufficient to sustain the charge on either of these counts the judgment must be affirmed."[106] But in cases like *King v. Board of Medical Examiners*,[107] where the court found that not all the charges were sustained and the only ones that were sustained were technical violations, the court

[102] 45 Cal.2d 304, 288 P.2d 502 (1955).

[103] See the district court of appeal opinion at 283 P.2d 318 (1955).

[104] See, *e.g.*, Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67 (1932).

[105] 59 Cal. App.2d 222, 138 P.2d 403 (1943).

[106] *Id.* at 223, 138 P.2d at 403.

[107] 65 Cal. App.2d 644, 151 P.2d 282 (1944).

held that revocation for such technical violations would be arbitrary, and ordered the case remanded for reconsideration of the penalty.

After the adoption of section 1094.5 there continued two divergent lines of authority with respect to the question of penalties. In one group of cases, represented by *Genser v. State Personnel Bd.*,[108] the courts held that if one of the charges was supported, it was immaterial that certain others were not, and the administrative determination would be affirmed. The courts here analogized to the rule in criminal law cases that where one is convicted on two counts and sentenced thereon, the sentence to run concurrently, a subsequent invalidation of the conviction of one of the counts will not secure a release for the defendant.

At the same time, however, another group of cases, illustrated by *Cooper v. Board of Medical Examiners*,[109] developed a somewhat different rule. In the *Cooper* case the board had revoked petitioner's license based upon two charges of unprofessional conduct. The California Supreme Court found one of the charges unsupported by the evidence, and believing that the board imposed the penalty as a single action for two acts of misconduct, remanded the case for a reconsideration of the penalty. In so doing the court said that since license revocation is in any event a " . . . drastic penalty, and . . . in consideration of the fact that we have no means of knowing whether the board itself would have imposed so severe a penalty for violation of count nine alone, we are of the view that the judgment should be reversed with directions to the trial court to set aside the order and send the matter back to the board for reconsideration . . . ."[110]

In making its determination in the *Bonham* case, the district court of appeal took the position that if the unsupported charges are minor and the supported ones are major, the penalty should not be disturbed. On the other hand, where the unsupported charges constitute a major part of the case and where it appears certain or even reasonably certain that the penalty imposed would not have been imposed solely for the supported charges, the case should be remanded for reconsideration of the penalty. When the case reached the California Supreme Court, the sole question presented was whether the courts below erred in failing to remand the case.[111] The court noted that under the Insurance Code[112] the commissioner had been vested with discretion to revoke or suspend licenses, and that his discretion

[108] 112 Cal. App.2d 77, 245 P.2d 1090 (1952). See also Hohreiter v. Garrison, 81 Cal. App.2d 384, 184 P.2d 323 (1947).

[109] 35 Cal.2d 242, 217 P.2d 630 (1950). See also Jones v. Maloney, 106 Cal. App.2d 80, 234 P.2d 666 (1951); Nelson v. Dep't of Correction, 110 Cal. App.2d 331, 242 P.2d 906 (1952); Garfield v. Board of Medical Examiners, 99 Cal. App.2d 219, 221 P.2d 705 (1950); Soutmen v. Reilly, 37 Cal.2d 713, 234 P.2d 969 (1951).

[110] Cooper v. Board of Medical Examiners, 35 Cal.2d 242, 252, 217 P.2d 630, 637 (1950).

[111] Bonham v. McConnell, 45 Cal.2d 304, 288 P.2d 502 (1955).

[112] CAL. INS. CODE § 1731.

regarding the appropriate penalty should not be disturbed unless there had been an abuse of discretion. But he should not be precluded, the court said, from exercising that discretion initially or where, as here, some of his findings of misconduct are not upheld by the court. In the court's words,[113]

> Where some of the findings are not supported by the evidence, it is obvious that his discretion has been exercised under a misconception as to the extent of the licensee's misconduct. If the case is not remanded, the commissioner will not be afforded an opportunity to exercise his discretion in the light of the established facts and thus perform the function entrusted to him by the Legislature.

In thus expressly overruling the *Rinker* case,[114] the court gave its approval to those cases which have ordered a remand for reassessment of the penalty where some of the material findings of the agency were not supported by the weight of the evidence. It is impossible to tell just how far the court intended to push such a rule. Would it apply, for example, in a case where the unsupported findings were mere technical details as distinguished from a major course of misconduct? It may be that the agencies would be wise to assess separate penalties for each major finding of misconduct, so that, in the event one such finding is not upheld by the court, that finding with its penalty might fall without any question that if the other counts are supported, their own penalty is supplied. It is undoubtedly wise to remand a case where it is not clear what the agency meant or would have done had it foreseen the ultimate findings of the court on review. But the rule could be pushed to the point that the court's insistence that the agency exercise its discretion freely will be an empty and burdensome victory. The agency might well say to the court, "One more such victory and I am undone."

CONCLUSION

The foregoing analysis of cases interpreting subsections (c) and (d) of section 1094.5 of the Code of Civil Procedure makes it clear that although the trial de novo function of the superior courts has been largely replaced by a more limited authority, the superior courts retain the position of watch-dog over the exercise of adjudicatory functions by statewide administrative agencies. This authority in the superior courts, coupled with the supreme court's holding in the *Moran* case[115] that the district courts of appeal and the supreme court shall review the decisions of the superior courts in such cases under the substantial evidence rule, places the superior

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[113] Bonham v. McConnell, 45 Cal.2d 304, 305, 288 P.2d 502, 503 (1955).

[114] 59 Cal. App.2d 222, 138 P.2d 403 (1943).

[115] Moran v. Board of Medical Examiners, 32 Cal.2d 301, 196 P.2d 20 (1948).

courts in a position of authority analagous to constitutional and local agencies. Mr. Justice Traynor has queried, "What special insight or qualifications does that court have to make its review of the identical record binding on the appellate court?"[116] The obvious answer is "None," except in those rare instances where the superior court retries a part of the case and observes the witnesses. But by the same token there is not that degree of discretion involved in the independent judgment cases which calls for any particular deference to an administrative agency's findings in a case where the findings of the administrator are contrary to those made by the hearing officer. Nevertheless, there is little doubt that we will continue to have this anamolous type of judicial review which is neither fish nor foul until such time as the California Supreme Court admits its error in the *Standard Oil* case and overrules it as precedent. Until it does so, there is not much that the Legislature or any other group can do about the problem. Even if the court were to state its belief that the *Standard* case was good for conditions in 1936 and was therefore correct at that time, circumstances have so changed since that date as to make many of the considerations underlying the *Standard* decision inapplicable today.

For one thing, we have the California Administrative Procedure Act, which we did not have in 1936. That act goes a long way toward guaranteeing fairness of process; the statewide agencies subject to its provisions most closely approximate the judicial type and the judicial function. The hearing officers appointed pursuant to that act are trained and qualified trial judges with, for the most part, as much legal ability as is required for service on the superior courts. There has been remarkably little complaint about the fairness and capabilities of the hearing officers appointed under the Administrative Procedure Act. I can see no particular reason for treating their decisions, made after notice and a fair hearing, as being entitled to less weight than the findings of a trial judge. In California, the decisions of local agencies are not subject to the Administrative Procedure Act; their procedures are often open to objection for looseness and lack of due process; yet they are accorded the same degree of finality as decisions of the trial courts. Why should the decisions of statewide agencies, which are subject to the Administrative Procedure Act, employ qualified hearing officers, and afford private litigants a much larger degree of protection, be treated with less deference by our judiciary? I am no advocate of administrative absolutism, but I confess that I see no justification for the time and effort that is wasted under the present "If at first you don't succeed, try, try again" system. Adoption by the California Supreme Court of the substantial evidence rule as defined by the United States Supreme Court in *Uni-*

[116] *Id.* at 317, 196 P.2d at 30.

versal Camera Corporation v. NLRB[117] as the basic standard for all judicial review in California would result in uniformity of practice, all around fairness, and an elevation of statewide agencies to a position which the Legislative intended them to have. Of course there is emotional appeal in the independent judgment concept. The cases largely involve individuals seeking to earn their living by pursuing one of the common callings. The administrator seeks by his action to deprive, temporarily or permanently, that individual of the right to engage in his chosen calling. In many cases the individual has a substantial investment of time, energy, and money in his occupation. The belief that no purely administrative tribunal should be empowered to divest him of his right to work at his chosen occupation is not without reason and experience to support it. But there is nothing to indicate that on the federal level, or in the many other states which permit administrative regulation of occupations subject to judicial review under the substantial evidence rule, the administrators have abused their authority. They could not do so under a *fair* application of the substantial evidence rule.

For the present, at least, we must depend upon the fairness and the understanding of the superior court judges for a proper distribution of power and separation of functions in the independent judgment cases. If those judges will keep in mind that theirs is a *review* function, it will not be difficult to maintain a proper balance between administrative and judicial functions. The degree of deference paid any administrative determination by any court in the land will depend in part upon the reputation of that agency for fairness, impartiality, and orderliness of procedure.[118] Over a period of time, with the observance of the due process rules spelled out in the Administrative Procedure Act, with the employment and use of qualified and unbiased hearing officers, and with the adoption of an attitude of judging that reflects a broader sense of duty than would be reflected by an agency bent upon enforcing its notion of justice regardless of all others, the statewide agencies may be able to instill that degree of public confidence which will bring about an end to the independent judgment anomaly.

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[117] 340 U.S. 474 (1951). I have shown in another article that the substantial evidence rule as defined there is broader in scope than the substantial evidence rule applied generally in California in both administrative and non-administrative law cases. See Netterville, *The Substantial Evidence Rule in California Administrative Law,* 8 STAN. L. REV. .....(1956).

[118] See the court's opinion in Terminix Co. v. Contractors' State License Bd., 84 Cal.App.2d 167, 190 P.2d 24 (1948), and note the court's obvious distaste for the agency's somewhat underhanded tactics in handling its investigation of petitioner's activities.