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Court Review of Administrative Decisions in California: The Pending State Constitutional Amendment

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(1) Court review of the decisions of state administrative agencies in California has been thrown into chaos by decisions of the state supreme court beginning in 1936 and climaxing in *Laisne v. California State Board of Optometry*¹ in the present year.

(2) These decisions interpret the state constitution as now denying power to the legislature to provide either adequate or appropriate remedies.

(3) The chief purpose of the pending state constitutional amendment is to give the legislature power to provide such remedies.

(4) If adopted, it will enable the legislature either to restore the old procedures for court review that were long in use before these disturbing decisions began or, better, to provide simpler modes of procedure for the purpose, in lieu of the common law writs which at their best were often of doubtful application because of technical distinctions.

NECESSITY FOR THE AMENDMENT

The recent decisions of our state supreme court have put us in a predicament. They have gone to two extremes. For some types of administrative decisions we can now obtain no court review whatsoever. On the other hand, for those types of administrative decisions

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¹ (March 16, 1942) 19 A. C. 901, 123 P. (2d) 457.

that are accorded court review the only so-called court review available is really not *review* at all but a complete retrial in the superior court where even on issues of fact the administrative decision is given no weight at all.

Thus the present situation is unsatisfactory both to those who, distrusting administrative agencies, seek to minimize their powers by subjecting them to the maximum court review, and to those who regard them as useful and essential instruments of government, and, while conceding the desirability of some court review in all cases, seek so to limit court review that the utility of the agencies will not be completely undermined.

Certainly one who distrusts these agencies does not want any of them put above the law. When, however, our supreme court holds that there is now no procedure available for haling some types of administrative decisions into court, the result is that a person aggrieved by that kind of decision can get no judicial relief even from errors of law, illegal procedure or arbitrary decisions of issues of fact. It is little consolation to him that he can go to court on other types of administrative decisions and get a complete retrial of all issues, for on the present state of the supreme court's decisions it is impossible for any lawyer to say what kinds of administrative decisions are subject to court review and what are not.

On the other hand, those who respect administrative agencies as valuable instruments of law enforcement believe that at least some of them should have power to make decisions of disputed issues of fact with some degree of finality. Otherwise, they say, in every contested case the administrative hearing is made waste motion, for the court substitutes itself for the agency, doing the latter's work all over again. Some of these agencies deal with questions that require technical knowledge and their personnel is selected with a view to that. Others deal with numerous recurring fact situations and by experience become expert in their special fields. It is said to be obvious that in many such matters an administrative agency may be better qualified than a judge to weigh evidence and reach a correct decision. Also, to drag an agency frequently into court hampers its performance of its other duties.

The administrative agencies dispose annually of an enormous number of "cases", a single agency often disposing of more than do all the courts combined. An opportunity to get a retrial in a court

tempts persons affected to try a second chance, tending to burden the courts with unnecessary litigation, impeding the discharge of their other duties.

The problem is one of properly dividing the burden of law enforcement between the judicial and the administrative organs of government. What should be the share of the courts, what the share of the administrative agencies? Normally the role of the courts should be one of supervision and control to prevent abuses, not substitution of the court for the agency, not a performance by the court of the agency's function. The most ardent admirer of so-called administrative justice concedes that there should be court review to set aside administrative decisions for error of law, including failure to follow the procedure prescribed by law, and to set aside decisions based upon arbitrary findings of the facts. Indeed there is no controversy except about the determination of issues of fact. What degree of finality shall the administrative findings be given? The general rule with respect to nearly all federal administrative agencies and those of other states is that their findings of fact are final if there is substantial evidence to support them. With respect to the issues of fact the reviewing court examines the evidence taken by the administrative agency, not to reweigh it, not to substitute the court's judgment for that of the agency, but to determine whether the agency acted rationally, that is, to see that it did not arrive at its conclusion arbitrarily. A New York state commission after three years study reports that the substantial evidence test has long been and is the invariable rule in that state.² The report states that "The substantial evidence rule . . . is broad enough, and is capable of sufficient flexibility in its application, to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication"³ that it "... affords a sufficient safeguard to individual interests without unduly impeding administration."⁴ It leaves the agency with "... a reasonable degree of responsibility . . ." while enabling the court to correct abuses.⁵

Prior to 1936 there were many decisions of our state supreme court holding that the decisions of state administrative agencies were

² BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* (1942) 328.

³ *Ibid.* at 336.

⁴ *Ibid.* at 338.

⁵ *Ibid.* at 337.

reviewable by writ of certiorari,⁶ and that under that mode of review the court could not set aside an administrative finding if it stood the test of the substantial evidence rule. The decision of the court in that year in *Standard Oil Co. of California v. State Board of Equalization*⁷ worked a revolution by holding that the writ of certiorari could no longer be used in this state to review the decisions of any state administrative agency which operates state-wide as distinguished from the administrative agencies of local governments. This decision applied to all state-wide administrative agencies except the Railroad Commission and the Industrial Accident Commission. The court has explained that the decisions of these two agencies are still reviewable by certiorari because they have a special status given them by provisions of the state constitution.⁸ In the review of the decisions of the Railroad Commission by the supreme court, and of the Industrial Accident Commission by either the supreme court or the district courts of appeal, the review on issues of fact is limited to the substantial evidence test. Are there no other responsible state administrative agencies to which that test is equally appropriate? Whether there are or not, the supreme court holds that the writ of certiorari under which that test is applied is no longer available. What had long been constitutional suddenly became unconstitutional.

The court in subsequent cases followed up its destruction of certiorari as an instrument for limited court review by holding that the only court review now available for almost all state administrative agencies is trial *de novo* in the superior courts. It has also held that for some types of decisions of state-wide agencies no court review whatever may now be had.

I shall briefly state without criticism the decisions that have produced this predicament. They have been fully commented on elsewhere.⁹ The question here is whether the effect brought about by these decisions should be overcome by constitutional amendment.

It should first be recalled that from the beginning of the state

⁶ Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California* (1941) 29 CALIF. L. REV. 275; Note (1937) 25 CALIF. L. REV. 694.

⁷ (1936) 6 Cal. (2d) 557, 59 P. (2d) 119.

⁸ *Ibid.* at 560, 59 P. (2d) at 121; *Drummey v. State Board of Funeral Directors* (1939) 13 Cal. (2d) 75, 81, 87 P. (2d) 848.

⁹ McGovney, *Administrative Decisions and Court Review Thereof in California* (1941) 29 CALIF. L. REV. 110; McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies* (1942) 15 So. CALIF. L. REV. 391, a criticism of *Laisne v. California St. Bd. of Optometry*, *supra* note 1; Turrentine, *op. cit. supra* note 6; Note (1937) 25 CALIF. L. REV. 694.

until 1936 court review of the decisions of administrative agencies, whether state-wide or local, was obtained chiefly by three writs inherited from English law and defined in our Code of Civil Procedure, namely, certiorari, prohibition and mandamus. Certiorari had the broadest application. By its use persons aggrieved by an administrative decision could question in court whether the decision was arrived at by error of law, including prejudicial error of procedure, whether the agency had acted beyond its jurisdiction and whether its findings of fact lacked substantial evidence to support them. The writs of prohibition and mandamus had more restricted uses. The former afforded a preventive remedy to forbid further proceeding of an agency where it was acting or about to act in a matter not within its jurisdiction. Mandamus provided a means to compel an agency to act where it legally should act but was refusing to do so, subject to the rule that the court could not dictate what result the agency should arrive at.

I have already mentioned the holding in *Standard Oil Co. of California v. State Board of Equalization*,¹⁰ in 1936, that the writ of certiorari could no longer be used in this state to get court review of any kind of error committed by an administrative agency that operates state-wide, excepting the Railroad Commission and the Industrial Accident Commission. In 1937 in *Whitten v. California State Board of Optometry*¹¹ the court held that the writ of prohibition could no longer be used to prevent such an agency from proceeding in a matter not within its jurisdiction.

Momentarily it seemed that these agencies were entirely freed from court supervision or control. Apparently awakening to a realization of the extreme to which it had gone, the supreme court intimated by dicta in 1937¹² and again in 1939¹³ that the legislature might get us out of the predicament, but also intimated that the legislature lacked power to do anything about it but to provide for original proceedings in the superior courts for complete retrial of the matters decided by the agencies. It is highly unlikely that the legislature would choose this extreme form of "review" as the universal remedy. The supreme court, without waiting, started to supply it. In 1939 in

¹⁰ *Supra* note 7.

¹¹ (1937) 8 Cal. (2d) 444, 65 P. (2d) 1296.

¹² *Ibid.* at 446, 65 P. (2d) at 1297.

¹³ *McDonough v. Goodcell* (1939) 13 Cal. (2d) 741, 752, 91 P. (2d) 1035, 1041.

*Drummev v. State Board of Funeral Directors*¹⁴ it held that where, after a hearing and upon evidence taken before it, a state professional board finds that a licensee has committed acts for which his license is by law revocable and revokes the license, the licensee may apply to the superior court for writ of mandamus and get a complete reweighing of the evidence by the court. It was not clear from the court's opinion whether the licensee was entitled to a trial *de novo*—a complete retrial on evidence adduced in court—but that is now immaterial, for the court in 1942 has reached that extreme result in *Laisne v. California State Board of Optometry*,¹⁵ which I have criticized elsewhere.¹⁶ While the exact point there decided is that administrative decisions *revoking licenses* are subject to trial *de novo* in the superior courts, the decision was rested upon grounds that apply to the fact decisions of every kind made by every state-wide administrative agency, with the two exceptions stated above.

The court in thus putting the writ of mandamus to novel uses has been uncertain in its mind as to how far it will go in that direction. In *McDonough v. Goodcell*¹⁷ in 1939 it held that mandamus could not be used to review a decision of a state professional board in deciding that an applicant was not entitled to a license. Thus an administrative decision *denying the grant* of a license is not now subject to any court review at all, while a decision *revoking a license* is subject to complete review.¹⁸ This inconsistent wavering between extremes warns us that unless the legislature is authorized to put order into chaos, it will take years of litigation to determine what kinds of administrative decisions are judicially reviewable and what are not.

The present situation is unsatisfactory to both those who desire court review and those who oppose unlimited court review. The theory of the proposed constitutional amendment is that whatever controversy there is in this respect with regard to any particular agency should be resolved by the legislature. The amendment itself takes neither side in this controversy. It merely enables the legislature to take either side. Yet, as will hereafter appear, the proposed amendment is carefully worded so that the legislature if it chooses to prescribe limited court review can go no further in that direction than

¹⁴ *Supra* note 8.

¹⁵ *Supra* note 1.

¹⁶ See note 9, *supra*.

¹⁷ *Supra* note 13.

¹⁸ For criticism of the asserted reasons for this curious distinction see 29 CALIF. L. REV. at 131-132, 140 (McGovney, *op. cit. supra* note 9).

to require the courts to respect an agency's finding of the facts where the finding is supported by substantial evidence. In other words the legislature will not be authorized to give any finality to the decisions of an administrative agency except a qualified finality to its decisions of issues of fact, qualified always by the rule that the court may set aside the decision if it finds that the agency did not have before it substantial evidence to support every essential finding.

The proposed amendment originated with an article contributed by me to the January, 1941, issue of this *Review*.¹⁹ The purpose and meaning of the original draft was there explained. That publication brought forth several constructive criticisms that led to some additions by way of amendment during its course through the legislature. No changes inconsistent with its original purposes were made. Some were made to make it more effectually accomplish its purposes. Some additions were by way of caveat to prevent its being given, by interpretation, unintended effects. While its purposes and effect are quite simple, their accomplishment required more extensive provision than at first seemed necessary.

In full the proposed amendment reads as follows:

"Resolved by the Senate, the Assembly concurring, That the Legislature of the State of California, at its Fifty-fourth Regular Session commencing on the sixth day of January, 1941, two-thirds of all the members elected to each of the two houses of said Legislature voting in favor thereof, hereby proposes to the people of the State of California that Section 1b be added to Article IV of the Constitution, to read as follows:

"Sec. 1b. Nothing in this Constitution shall be construed as denying to the Legislature power to vest in administrative officers, boards, commissions or agencies authority to decide, in the first instance, any questions of law or fact upon which the exercise of any function conferred upon them by law depends or power to provide that a finding of fact made by any administrative officer, board, commission or agency in the exercise of his or its functions shall not be set aside by any court if there is substantial evidence to support it. When any city or city and county, which has adopted or shall adopt a charter in pursuance of this Constitution, has provided or shall provide by charter, by any amendment thereof, or by ordinance, that decisions of questions of fact made by any administrative officer, board, commission or agency in respect to municipal affairs shall be final, no court of this State shall have power to set aside such finding of fact if there is substantial evidence to support it. Nothing in this section

¹⁹ *Ibid.* at 159.

shall be construed as limiting the power of any county, city, or city and county under this Constitution to make and enforce within its limits local, police, sanitary and other regulations and, when not in conflict with general law, to provide by ordinance that decisions of questions of fact made by any administrative officer, board, commission or agency shall be final.

"The Legislature is hereby vested with plenary power, unlimited by any provision of this Constitution except as provided in this section, to prescribe procedures by which judicial review of decisions of administrative officers, boards, commissions or agencies may be obtained and the scope of review which the reviewing court may give, including power to make any prescribed review either alternative to or exclusive of any review the courts are now authorized to give, and for these purposes the Legislature shall have plenary power to enlarge or restrict the jurisdiction of any court of this State; provided, however, that any enlargement of the original jurisdiction of the Supreme Court shall be subject to the power given that court by Section 4c of Article VI of this Constitution. Review by any court of any administrative decision may be reviewed in any higher court in the manner and to the extent that the Legislature may prescribe.

"No court of this State except the Supreme Court shall have power to review any order or decision of the State Railroad Commission; and no court of this State except an appellate court shall have power to review any decision or award of the Industrial Accident Commission."²⁰

The Amendment opens with a purely declaratory statement that the legislature has power which it has always exercised, and which until recently had never been doubted.

"Nothing in this Constitution shall be construed as denying to the Legislature power to vest in administrative officers, boards, commissions or agencies authority to decide, in the first instance, any questions of law or fact upon which the exercise of any function conferred upon them by law depends"

Administrative officers or boards cannot perform the acts required of them by statute without interpreting the statute to determine when it requires them to act, and what action it requires them to take. Consequently they *must* decide *in the first instance* questions of law upon which the exercise of their functions depends. So also they must decide in the first instance whether in any particular case the facts are such as to make the statute applicable. The clause above quoted says nothing about the finality of such first in-

²⁰ Cal. Stats. 1941, p. 3549.

stance decisions. The clause would be a mere platitude, stating the obvious, except for disturbing dicta of the supreme court in its recent decisions. It is repeatedly affirmed in these cases that for the legislature to confer "judicial functions" or even "quasi-judicial functions" on an administrative board with state-wide powers would violate the judiciary article of the state constitution. This statement would be harmless if it meant that such officers and boards may not be given functions that are *exclusively* judicial, provided also the court accepted the current views of other courts in deciding what functions are *exclusively* judicial. But the court holds that deciding issues of fact with the least degree of finality is a "judicial function", meaning that it is exclusively a function of courts, and by this interpretation such a function cannot constitutionally be conferred on a state-wide administrative agency.

In the *Drumme*y case the court said,

"If it should be held that the board's action in cancelling or suspending an existing license is binding on the courts, if such action is predicated on conflicting evidence, we would be necessarily holding that such board is exercising at least *quasi-judicial* powers. It is the essence of judicial action that finality is given to findings based on conflicting evidence. *If the statute be so construed it would violate the state Constitution.*"²¹

It seemed that the court thought that whatever courts have traditionally done is exclusively a judicial function. It would follow logically that deciding questions of law or fact without finality are equally so, for trial courts have traditionally made first instance decisions of such questions, without any finality when their decisions on the facts as well as on the law are made completely reviewable by appellate courts. If an administrative board may not be authorized to do anything that trial courts have traditionally done then statutes empowering them to decide issues of fact or law without finality are unconstitutional. In drafting the proposed amendment it was thought best to lay these disturbing *dicta* to rest, by declaring that the constitution means what it had previously been supposed to mean. This opening clause says merely, that it is *not* unconstitutional to give state-wide administrative boards the accustomed power to make preliminary, or first instance decisions of law and fact upon which their

²¹ *Supra* note 8, at 84, 87 P. (2d) at 853. (Italics added.)

official action depends. So far as above quoted the passage says nothing about finality.

It is in the clause next to be quoted that finality of decision is dealt with. In reading it, it will be noted that it merely *enables*, not requires, the legislature to give *qualified* finality to an agency's decisions of *questions of fact*, but finality in no other respects. Thus this next clause gives the legislature

"... power to provide that a finding of fact made by any administrative officer, board, commission or agency in the exercise of his or its functions shall not be set aside by any court if there is substantial evidence to support it."

This is the heart of the whole amendment. I emphasize that. The entire remainder of the proposed amendment, except the part dealing with local administrative agencies, is by way of supplementation of this central provision.

The court in its latest utterance now affirms that it has no intention of carrying the *dicta* referred to above to a logical conclusion. It now affirms that it is not the conferring of power to make first instance decisions of questions of fact that is unconstitutional but the conferring of power to make them with the least degree of finality.²²

It is now the fundamental premise of the court that the legislature may not, except where authorized by special constitutional provision, vest fact finding power in a state-wide administrative agency *unless* its fact finding is subject to complete retrial in the courts. If the legislature does not by statute provide for such retrial, the court itself will supply it by expanding the use of the writ of mandamus, though not consistently to all classes of administrative decisions, as is shown above.

The court affirms that this result is produced by several provisions of the state constitution as it interprets them, namely, the due process clause of article I, section 13, the separation of powers principle in article III, and article VI on the judicial department, especially section 1.

It does not help our predicament that the Supreme Court of the United States does not so interpret like provisions of the Federal Constitution, nor that the courts of other states find no such meaning

²² *Laisne v. California St. Bd. of Optometry*, *supra* note 1, at 913-914, 123 P. (2d) at 464.

in like provisions of their constitutions. It was hoped that decisions elsewhere, and its own former decisions as well, would lead our supreme court to abandon its position, but after nearly two years of deliberation a four to three majority of the court in the *Laisne* case has reaffirmed it.

The desirability of enabling the legislature to give a *qualified* degree of finality to the fact decisions of at least some state administrative agencies has been fully discussed above. Opposition to the proposed amendment seems to be coming from persons who fear that the legislature will do that sweepingly with respect to all the agencies. The history of legislation in the state indicates that it will not do so. With respect to decisions of various kinds made by state administrative agencies the legislature has prescribed complete judicial review.²³ For others it has prescribed review by certiorari or, what is the same thing, it has required the court to go no further on the issues of fact than to apply the substantial evidence test.

The next clause deals with local administrative agencies, first the charter governments:

"When any city or city and county, which has adopted or shall adopt a charter in pursuance of this Constitution, has provided or shall provide by charter, by any amendment thereof, or by ordinance, that decisions of questions of fact made by any administrative officer, board, commission or agency in respect to municipal affairs shall be

²³ No attempt has been made by me to make an exhaustive list of these instances. A few are noted here. The Alcoholic Beverages Control Act of 1935 (Cal. Stats. 1935, p. 1123) as amended in 1937 (Cal. Stats. 1937, p. 2126) before the decision in the Drumme case, *supra* note 8, provides for complete retrial in the superior court on "... the weight of the evidence adduced before said court ..." of "... any ruling, order or decision of the board [the State Board of Equalization] ..." making an assessment of taxes or refusing to grant or to revoke any of the numerous kinds of licenses provided for in the statute. CAL. GEN. LAWS (1937) act 3796, §46.

While the legislature has made the Labor Commissioner's decisions, refusing, suspending or revoking a private employment agency's license subject to limited review by certiorari (Cal. Stats. 1927, p. 554, §4, now CAL. LABOR CODE §§1598, 1599) his decisions of other controversies arising out of the laws governing private employment agencies are subject to trial *de novo* in the superior court. Cal. Stats. 1923, p. 936, now CAL. LABOR CODE §1647. See *Collier & Wallis, Ltd. v. Astor* (1937) 9 Cal. (2d) 202, 70 P. (2d) 171. Some decisions of the Division of Water Rights in the Department of Public Works are by statute reviewable by trial *de novo*. *Standard Oil Co. of California v. State Board of Equal.*, *supra* note 7, at 561-562, 59 P. (2d) at 120-121. Under the Retail Sales Tax Act of 1933 decisions of the State Board of Equalization assessing sales taxes are subject to trial *de novo* by suit in the superior court of Sacramento brought to recover taxes after payment. Cal. Stats. 1933, p. 2610, §31. The *alternative* review by certiorari provided in §33, (*ibid.* at p. 2611) was stricken down in the *Standard Oil Co.* case, *supra* note 7.

final, no court of this State shall have power to set aside such finding of fact if there is substantial evidence to support it."

This clause pays respect to the local autonomy given charter governments by our state constitution. It is concerned only with those local administrative agencies that deal with so-called "municipal affairs", that is, those matters in which charter governments have home rule. The supreme court of the state distinguishes local administrative agencies from those exercising state-wide authority. It holds that there is now no constitutional objection to vesting in local agencies finality of fact finding, and therefore no objection to certiorari review of their decisions. Moreover it is established by the decisions that these local units of government may either by express or implied provisions in their charters give qualified finality to the decisions of their administrative agencies.²⁴ On both these points the proposed constitutional provision is merely declaratory of the present law. It is inserted to make it clear that the amendment in increasing the power of the legislature is not intended to increase its power over local agencies dealing with municipal affairs—not intended to disturb the present regime of local autonomy. It is all purely declaratory of the present law with exception of the provision that charter governments may *by ordinance*, as well as by charter provision, confer qualified finality of fact finding on their local boards. There seem to be no judicial decisions on this point. The advocates of the proposal saw no reason for any distinction in this respect. They believed that the power of the local governments to provide by *ordinance* for their local agencies should run parallel with the power of the central government to provide by *statute* for its agencies.

In the next clause the dominant word is "limiting".

"Nothing in this section shall be construed as limiting the power of any county, city, or city and county under this Constitution to make and enforce within its limits local, police, sanitary and other regulations and, when not in conflict with general law, to provide by ordinance that decisions of questions of fact made by any administrative officer, board, commission or agency shall be final."

Persons interested in the non-charter local governments, those which have no constitutionally secured local autonomy, contended that non-charter local governments now have power to provide by ordinance that the fact finding of their local boards shall have quali-

²⁴ See Elliott, *Certiorari and the Local Board* (1941) 29 CALIF. L. REV. 586, 600.

fied finality, when such ordinance is not in conflict with any state statute. No court decisions were produced to substantiate this contention. On the other hand, it should be made clear that no decisions were found to the contrary. The present law on the point is uncertain. The proponents of the amendment declined to resolve the doubt. They were concerned with agencies exercising state-wide authority and preferred to take no position with respect to other agencies concerning which the law is in doubt as it now stands. Representatives of non-charter local governments replied that the express recognition of power in charter governments to deal with the subject might be construed as impliedly denying like power in the non-charter governments. The result was the compromise statement above quoted. It asserts definitely that whatever the law on the point now is with respect to non-charter governments this amendment leaves it unchanged. This is accomplished by the statement that nothing in this new section of the constitution, if adopted, "shall be construed as *limiting* the power of any county, city or city and county"—whether charter or non-charter.

It may be remarked that the *legislature* having complete power over non-charter local governments may create local administrative agencies therein with qualified finality of fact finding. This is the present law.

Now comes the second long paragraph of the proposed amendment. The first part of which reads,

"The Legislature is hereby vested with plenary power, unlimited by any provision of this Constitution except as provided in this section, to prescribe procedures by which judicial review of decisions of administrative officers, boards, commissions or agencies may be obtained and the scope of review which the reviewing court may give . . ."

This provision has a two-fold function. It will enable the legislature to provide judicial review of those classes of administrative decisions that are not now subject to any court review, according to the decisions of our supreme court. Secondly, it will enable the legislature, when it desires, to give qualified finality to the fact decisions of any agency, to limit court review and thereby accomplish its purpose. Finality of administrative decision, in any degree, and limitation of court review are but the converse of each other. Consequently it is provided that the legislature may prescribe the scope of review. Since

by the first paragraph of the proposed amendment the only finality that the legislature is authorized to give to an agency's decisions is a qualified finality in fact finding, it follows that in prescribing the scope of review the legislature may not exclude review of errors of law or procedure, but may limit review on fact questions only, and even on such questions it must permit the reviewing court to determine whether there is substantial evidence to support the administrative decision. On the other hand the provision enables the legislature to prescribe complete retrial in a court, if it sees fit.

The expression, "unlimited by any provision of this Constitution" is essential because, as I pointed out above, the state supreme court has interpreted three provisions of the constitution as standing in the way of giving state-wide administrative agencies power to decide issues of fact with any degree of finality. Strange to say the supreme court has found that still a fourth provision of the state constitution blocks another important objective of the proponents of the proposed amendment. The proponents believe that the legislature should have power to cut the cloth of judicial review to fit each particular agency.

The decision in *Mojave River Irrigation District v. Superior Court*²⁵ knocked out what the legislature thought was the proper sort of judicial review of decisions of the Water Commission granting or refusing permits to appropriate water. The statute provided for an "action" in the superior court "for a review of the order of the state water commission", and directed the court to consider all evidential data considered by the Commission together with additional evidence and give judgment "affirming, reversing, or modifying" the order of the Commission.²⁶

The ground for holding this statute unconstitutional was that it was a special law "... regulating the practice of courts of justice ..." forbidden by article IV, section 25, point "third", of the state constitution. It was "special", said the court, in two particulars. (1) It required the court to consider evidence not admissible in ordinary actions and (2) it required the court to give a limited judgment, limited to "affirming, reversing or modifying"!

The court said,

"Neither does there appear to be any sufficient reason why the purely administrative action of the division of water rights in granting or

²⁵ (1927) 202 Cal. 717, 262 Pac. 724.

²⁶ Cal. Stats. 1923, p. 162, §1b.

refusing permits to appropriate water should have accorded to it and its orders, or to the persons or associations affected thereby, the special right of a judicial method of review differing essentially from that available in courts of justice to all other similar functions and empowered to issue similar orders in similar applications for similar privileges or permits."²⁷

It would follow from that statement that the legislature under the constitution as it now stands must adopt a uniform procedure for the review of what the court thinks is one type of administrative action, regardless of the interests affected, or the reliability of the board or commission charged with the function, and the court seems to think that all permit-granting or licensing authorities are to be classed as one type. If adhered to, this doctrine would seriously cramp the legislature in providing for each administrative agency the kind of judicial review that the legislature thinks is needed in the circumstances.

Still another constitutional obstacle must be removed. The constitution expressly provides that both the superior courts and the appellate courts have power to issue the writs of certiorari, prohibition and mandamus. The state supreme court holds that the legislature cannot modify the scope of these writs either by way of expansion or restriction.²⁸ The scope and uses of these writs are now determined by the state supreme court. By the present decisions, the first two are no longer usable to review decisions of state-wide administrative agencies; while the third, when usable, secures complete retrial.

The proposed amendment will enable the legislature, if it so desires, to restore the writs of certiorari and prohibition to their former uses. But unless the legislature is given power to cut off the new use to which mandamus has been recently put, it cannot provide for a limited court review. Otherwise, supposing the legislature were to provide a procedure for limited review of the decisions of some agency, what would prevent the courts from exercising the power given by the constitution, as the supreme court interprets it, to give trial *de novo*, by a mandamus proceeding?

To get away from all the constitutional objections the court finds

²⁷ 202 Cal. at 727, 262 Pac. at 728.

²⁸ *Miller & Lux v. Board of Super's* (1922) 189 Cal. 254, 208 Pac. 304; *Standard Oil Co. of California v. State Board of Equal.*, *supra* note 7; *Whitten v. State Board of Optometry*, *supra* note 1.

to the legislature's attempts to solve these problems, the proposed constitutional amendment hits the difficulties squarely. It follows two good precedents by amending the constitution expressly to remove all obstacles. In order to enable the legislature to enact a workmen's compensation law and to establish an administrative tribunal to adjudicate compensation claims, the constitution was amended to read,

"The Legislature is hereby expressly vested with plenary power *unlimited by any provision of this Constitution*, to create" ²⁹

Somewhat similar is the amendment adopted to unshackle the legislature with respect to the establishment of the Railroad Commission, which declares, ". . . the right of the Legislature to confer powers upon the Railroad Commission is hereby declared to be plenary and to be *unlimited by any provision of this Constitution*" ³⁰

The above discussion makes obvious the purpose of the next following phrase in the proposal:

" . . . including power to make any prescribed review either alternative to or exclusive of any review the courts are now authorized to give"

We come now to a further technical provision:

" . . . and for these purposes the Legislature shall have plenary power to enlarge or restrict the jurisdiction of any court of this State"

A statute requiring either the superior courts or the appellate courts to review the decisions of state-wide administrative agencies by *certiorari* would be enlarging the jurisdiction of those courts as defined in the constitution as now interpreted. So on the supreme court's construction the same would be true of a statute prescribing a simpler mode of procedure for limited review. The court says,

"Of course, it is not competent for the legislature, without constitutional authority, to confer upon this court jurisdiction to issue a writ different from but in the nature of *certiorari* for that body may not trench upon, enlarge or diminish the constitutional jurisdiction of this court or any other state court." ³¹

²⁹ Art. XX, §21. (Italics added.)

³⁰ Art. XII, §23a. (Italics added.)

³¹ *Standard Oil Co. of California v. State Board of Equal.*, *supra* note 7, at 562, 59 P. (2d) at 121.

On the other hand curtailing the use by the superior courts of the writ of mandamus to give complete retrial of controversies decided by administrative agencies would be restricting their jurisdiction, contrary to the constitution *as now construed* by the supreme court, since all of these courts now have "constitutional jurisdiction" to issue that writ for the purposes the supreme court *now* says it may be used. Probably the provision above giving the legislature power to "prescribe procedures" for review and the "scope of review" would imply a power to enlarge or restrict the jurisdiction of the courts "for these purposes" but to leave no doubt the proposed amendment specifically so provides.

It is clear that the amendment gives the legislature no power to enlarge or restrict the jurisdiction of the courts for any other purpose.

The proposed amendment will give the legislature power to choose the superior courts for review, these being the appropriate courts where the legislature desires trial *de novo*. It will give the legislature power, as an alternative, to vest review in the appellate courts. It is believed that the legislature ordinarily will choose the district courts of appeal as the most appropriate courts to review decisions of the *more important* administrative agencies, particularly where the legislature wants to limit that review to errors of procedure and issues of law, including the issue whether there is any substantial evidence to support the findings of fact.

The considered judgment of the American Bar Association, after about five years study on this point, was shown by the Walter-Logan Bill, drafted by its committees, and sponsored by it. This bill also expressed the view of Congress and its committees after long study. In all cases covered by the Walter-Logan Bill review was lodged in the circuit courts of appeals of the United States or in the court of appeals for the District of Columbia,³² which rank in the federal court system where the district courts of appeal rank in the California court system. The opponents as well as the advocates approved this part of the bill.³³

There were some federal agencies expressly excepted from the

³² §5(a), H. R. 6324, 76th Cong. 3d. Sess. (Nov. 28, 1940), which may conveniently be found in 29 CALIF. L. REV. at 154, n. 136 (McGovney, *op. cit. supra* note 9).

³³ The President's veto of the bill was based upon other features. What opposition there was to it, in and out of Congress, centered against its first half which had nothing to do with judicial review of administrative decisions but dealt with administrative rules and regulations and prescribed a procedure for making them which many persons thought was impractical.

Walter-Logan Bill.³⁴ This was because Congress was satisfied with the review it had already provided in special statutes dealing with these agencies. Many of these special statutes vest review of particular agencies in the federal appellate courts. In fact, trial *de novo* of federal administrative action is rare.

The value of having an opportunity to seek immediate review in some instances in the appellate courts is well illustrated by the results of the supreme court's decision in *Standard Oil Co. of California v. State Board of Equalization*.³⁵ The legislature had authorized alternative modes by which a taxpayer could obtain review of an assessment of taxes by that Board under the Retail Sales Tax Act of 1933. One was by trial *de novo* in the superior court of Sacramento County to recover an alleged excess after having made the payment demanded. The other was by certiorari. The oil company invoked the original jurisdiction of the supreme court by using the latter alternative. It wanted to put in issue nothing but questions of law—whether a tax assessed on particular sales was authorized by the statute properly interpreted, or whether if interpreted to authorize this tax the statute imposed an unconstitutional burden on interstate commerce. It was important both to the company and to the State Board of Equalization to get a prompt decision of those questions, for other assessments also presented them. The court held that certiorari could not be used to review decisions of the Board.

The result was that the taxpayer had to resort to the superior court. In fact the oil company had already filed four complaints in the superior court of Sacramento County involving similar transactions and the same issues of law. By agreement of opposing counsel prosecution of those suits had been deferred to await the outcome of the supreme court's decision in the certiorari case. When the supreme court's decision was rendered on June 23, 1936, these suits were proceeded with. It took until June 8, 1937, substantially a year, to get a decision in the superior court, which held that the sales were legally and constitutionally subject to the tax. On appeal the district court of appeal reversed this decision on June 19, 1939.³⁶ Apparently a hearing in the supreme court was not requested and the law of the case was finally settled by this decision of the district court of appeal, three years after the supreme court might have settled it in the cer-

³⁴ §7(b).

³⁵ *Supra* note 7.

³⁶ *Standard Oil Co. v. Johnson* (1939) 33 Cal. App. (2d) 430, 92 P. (2d) 470.

tiorari case. Final judgment in the cases was not reached in the superior court until March 1941. The taxes involved had been paid in the years 1933 to 1935. Many other cases under the Retail Sales Tax Act which were started in the superior court have been carried to the district courts of appeal and two of them have been heard subsequently in the supreme court. All turned exclusively on questions of law. To start these cases in the superior court was a waste of time and money which could have been avoided if there had been a procedure for taking them directly to an appellate court. The same thing happens under several other tax statutes and also with respect to administrative decisions in other fields than taxation.

The bare recital of these facts is enough to show that a constitutional amendment is needed to enable the legislature to provide a method for getting a prompt appellate court decision on questions of law involved in administrative proceedings, both in the interest of the private person affected and for the guidance of the administrative agencies.

The proposed amendment, as stated above, will permit the legislature to make use of the common law writs, certiorari, prohibition, mandamus and injunction. Its power, however, is not limited to choosing one or more of these procedures. It may devise any new procedure it sees fit. It may do what the Walter-Logan Bill proposed,³⁷ that is, it may provide that any person who objects to an administrative decision affecting him may file a simple "written petition" with the clerk of the court, "for review of the decision", and obtain the scope of review the legislature may prescribe. A simple mode of review defined by statute would be superior to review by any of the old writs, for each of them has its technicalities and uncertainties.

To the above provision authorizing the legislature "for these purposes" to enlarge or restrict the jurisdiction of any court is hung the proviso:

"... provided, however, that any enlargement of the original jurisdiction of the Supreme Court shall be subject to the power given that Court by Section 4c of Article VI of this Constitution."

The section referred to provides,

"The Supreme Court shall have power to order any cause pending before the Supreme Court to be heard and determined by a District Court of Appeal"

³⁷ §5(a). See note 32, *supra*.

This enables the court to unload a part of its burdens. It is unwise, however, for it to exercise this power in any case where the issue involved is so important that it deserves decision by the court of last resort. The decisions of the Industrial Accident Commission are now reviewable either in a district court of appeal or in the supreme court at the option of the plaintiff. The supreme court carried its load of these cases for many years, but recently has shunted some of them to the courts of appeal.

The final sentence of the second paragraph is,

"Review by any court of any administrative decision may be reviewed in any higher court in the manner and to the extent that the Legislature may prescribe."

If the legislature sees fit to vest review of the decisions of a particular agency in the superior court, this clause empowers it to authorize review of the superior court's decision in a district court of appeal, with further review in the supreme court, and the legislature may specify what shall be the scope of review to be given by either of these appellate courts. Likewise, where the district court of appeal is chosen as the reviewing tribunal the legislature may allow review of its decision by the supreme court.

The last paragraph reads,

"No court of this State except the Supreme Court shall have power to review any order or decision of the State Railroad Commission; and no court of this State except an appellate court shall have power to review any decision or award of the Industrial Accident Commission."

The constitution as it now stands does not definitely prevent the legislature from abolishing the present original and *exclusive* jurisdiction of the supreme court to review the orders or decisions of the State Railroad Commission.³⁸ Long and satisfactory experience with the present review exclusively in the supreme court justifies perpetuating it by constitutional provision. The constitution, article XX, section 21, already provides that the review of the decisions of the Industrial Accident Commission shall be in "the appellate courts of this State". The proposed amendment merely reaffirms that proposition to prevent an implied repeal.

³⁸ See *Pacific Tel. & Tel. Co. v. Eshleman* (1913) 166 Cal. 640, 137 Pac. 1119.