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The Scope of Judicial Review of Administrative Determinations in Nebraska

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THE SCOPE OF JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS IN NEBRASKA[1]

The administrative agency is now an essential part of our governmental system, and this great growth of the agency and the increase in its functions leads to a variety of difficult problems for the lawyer. The finality which the determinations of an agency should be accorded has long been a major problem. The purpose of this comment is to examine the scope of review exercised by the courts in Nebraska. The standard of review used by the Nebraska Supreme Court in reviewing administrative determinations will be compared to appellate review for jury cases and non-jury cases in Nebraska, as well as to the standards used on the federal level. Such an examination, it is hoped, will provide some insight into the adequacy of the existing scope of review, and into appropriate remedial changes. Those agencies which are not generally concerned with problems on a state basis are not specifically covered, and a discusion of the injunction and the writ of mandamus has been purposely omitted as outside the scope of this paper.

There is a great variety of statutory provisions regarding both the appeal from agency determinations and the type of review to be given. It should be noted that unless such an appeal is provided for, other methods of obtaining judicial review must be used.[2] The scope of review granted will vary with the statutory provisions covering the particular agency; and, of course, the type of review provided should vary with the type and nature of the administrative action and procedure. There is not at the present time any statutory provision in the Nebraska Administrative Procedure Act[3] covering the scope of judicial review, but there has been an attempt to get such legislation through the Unicameral.[4] The prob-

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[1] For a compilation of various tests used in the scope of judicial review of administrative agencies in selected areas in all of the states see *Report of the Committee on Administrative Agencies and Tribunals*, 63 A.B.A. REP. 623 (1938).

[2] If a statutory method of appeal has not been provided, the right to appeal does not exist; and a litigant may obtain judicial review only by a petition in error in the district court or, perhaps, by the use of one of the extraordinary remedies. See Roberts v. City of Mitchell, 131 Neb. 672, 269 N.W. 515 (1936). This point, as well as the scope of judicial review in such cases, will be discussed later.

[3] NEB. REV. STAT. §§ 84-901 to -915 (Supp. 1961).

[4] L. B. 133, 68th Neb. Leg. Sess. (1957). This bill provided: "Sec. 9 . . . (5) The review shall be conducted as a de novo proceeding by the court without a jury. (6) The court may affirm the decision of the agency

lem can best be approached by examining three different situations: (1) Where the legislature has provided for a statutory appeal but has not defined the scope of review, thus leaving that question open to a determination by the court; (2) Where there are statutory provisions providing for an appeal and the scope of review is defined by statute; and (3) Where no statutory appeal is provided and the party is left to a petition in error.

I. STATUTORY APPEAL WITH NO STATUTORY DEFINITION OF THE SCOPE OF REVIEW

The administrative agencies for which there is provided a statutory appeal, but for which there are no statutory provisions regarding the scope of review are few.[5] The best known class of cases are those which arise on appeal from the State Railway Commission. Almost all of the litigation in the area of administrative law in Nebraska is concerned with this Commission, and the basic test for the scope of judicial review is found primarily in its cases. The direct appeal from the State Board of Equalization and Assessment[6] falls within this category, as well as appeals from the Department of Water Resources.[7] The test which the court uses in this area is easy to state; but, by the very nature of the words in-

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or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is: (a) In violation of constitutional provisions; (b) In excess of the statutory authority or jurisdiction of the agency; (c) Made upon unlawful procedure; (d) Affected by other error of law; (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or (f) Arbitrary or capricious. . . . " The governor's veto message is found in NEB. LEG. J. 2019, 68th Sess. (1957). The above provision, with the exception of the provision for a de novo proceeding, is the same as the corresponding section of the MODEL ACT. See MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 12(7) [Hereinafter cited as MODEL ACT].

[5] Those agencies which have such statutory standards generally provide for de novo review. This class of cases will be covered in a later section which will include all types of review which are broader or narrower than the test to be set out in this section with the exception of the petition in error.

[6] NEB. REV. STAT. § 77-510 (Reissue 1958) provides for an appeal to the Supreme Court from a final decision of the board with respect to the valuation of any real or personal property. This is to be distinguished from an appeal from a reassessment by the state board (§ 77-313), an appeal from an assessment of railroad property (§§ 77-613 to -618), and appeals from county boards of equalization (§§ 77-1510 to -1511) (Supp. 1961). All of these cases will be considered in a later section since the review is different, at least according to the applicable statutes.

[7] NEB. REV. STAT. § 46-210 (Supp. 1961).

volved, it is difficult to apply. This is not to say, however, that the inherent vagueness of any test involving terms such as "reasonable" is necessarily undesirable or, indeed, that any more satisfactory test could be found.[8] Likewise, such a test may not be any more vague, or any less susceptible to precise definition, than similar legal standards in other areas of the law.

Section 75-405[9] of the Nebraska statutes provides that orders or decisions of the Railway Commission may be appealed directly to the Supreme Court where they may be reversed, modified, or vacated. The procedure is the same as that in force for appeals from the district court to the Nebraska Supreme Court.[10] The orders of the Commission and the findings of facts and conclusions in the record are "prima facie evidence of every fact found, and that such order or orders are prima facie just and reasonable."[11] The statute also provides that certain orders are to be in effect until annulled, modified or reversed, or until adjudged "unreasonable or unjust."[12] These statutory guides are rarely mentioned by the court,[13] and the exact meaning and effect of them has never been fully explained. It would seem that the court has arrived at about the same standard without quoting the statute.[14] The scope of review with respect to the sufficiency of the evidence under the statutes was first

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[8] For example, Professor Davis when speaking of the meaning of the term "substantial evidence" says that it is about as clear and about as vague as it should be. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01 at 118 (1958) [Hereinafter cited as DAVIS].

[9] NEB. REV. STAT. § 75-405 (Reissue 1958).

[10] The statute for the Department of Water Resources provides for essentially the same procedure. NEB. REV. STAT. § 46-210 (Reissue 1960). For the procedure for appeals from the district court to the Nebraska Supreme Court see §§ 25-1911 to -1929 (Reissue 1956).

[11] NEB. REV. STAT. § 75-415 (Reissue 1958).

[12] NEB. REV. STAT. § 75-416 (Reissue 1958). This section refers to the orders provided for in §§ 75-412 to -415.

[13] Strasheim v. Martin, 169 Neb. 787, 101 N.W.2d 161 (1960); Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N.W.2d 265 (1959); Houk v. Beckley, 161 Neb. 143, 72 N.W.2d 664 (1955); Safeway Cabs, Inc. v. Honer, 154 Neb. 533, 48 N.W.2d 672 (1951); *In re* Application of Airline Ground Serv., Inc., 151 Neb. 837, 39 N.W.2d 809 (1949). In these cases the court referred to these statutes, but did not go beyond merely citing the section or discussing it regarding another matter.

[14] The present test uses the term "reasonable" as distinguished from arbitrary.

fully explained in *Byington v. Chicago, R.I. & P. Ry.*, where the court laid down the following rule:[15]

> [I]t was decided that under this amendment appeals from the orders of the commission directly to this court are to be considered and determined in the same manner as appeals from judgments of the district court upon trial by jury in civil cases. It has uniformly been held by this court that in such cases the judgment of the district court will not be reversed unless it affirmatively appears from the record that it is clearly wrong.

The rule that unless it appears affirmatively from the evidence in the record that the Commission is "clearly wrong," has been restated in a number of cases which followed *Byington*,[16] but the rule in this form at least, has not been repeated for many years. Whether it has been discarded in favor of the rule now found in the cases, or whether the rules are in reality the same, is a question which cannot be precisely answered. This question will be discussed after an examination of the rule as it is presently stated by the court.

A. THE PRESENT RULE

The Nebraska Supreme Court now says its review is not de novo,[17] but whether this rule is actually followed is a difficult question to answer.[18] The rule has often been stated as follows: The only questions for the court are whether the agency acted within the scope of its authority, and whether or not the order was arbitrary and unreasonable.[19] If the order or decision of the Com-

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[15] 96 Neb. 584, 593, 148 N.W. 520, 523 (1914). This case followed immediately after Hooper Tel. Co. v. Nebraska Tel. Co., 96 Neb. 245, 147 N.W. 674 (1914), which held this method of appeal was constitutional and that the appeal was to be governed by the statutes that apply to appeals from the district court.

[16] Omaha & C.B. St. Ry. v. City of Omaha, 125 Neb. 825, 252 N.W. 407 (1934); Farmers & Merchants Tel. Co. v. Orleans Community Club, 116 Neb. 633, 218 N.W. 583 (1928); Southern Nebraska Power Co. v. Taylor, 109 Neb. 683, 192 N.W. 317 (1923); Rawlings v. Chicago, B. & Q. R.R., 109 Neb. 167, 190 N.W. 569 (1922); Omaha & C.B. St. Ry. v. Nebraska State Ry. Comm'n, 103 Neb. 695, 173 N.W. 690 (1919).

[17] Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401, 265 N.W. 234 (1936); Northwestern Bell Tel. Co. v. Nebraska State Ry. Comm'n, 128 Neb. 447, 259 N.W. 362 (1935).

[18] See Viren, *Appeals from Administrative Agencies to State District Court, and Appeals from Administrative Agencies to Supreme Court*, 41 NEB. L. REV. 397, 407-08 (1962). It is suggested, however, that a proper application of the rule for this type of case, recognizing the necessary distinctions, is not equivalent to a trial de novo.

[19] See, *e.g.*, Ainsworth Irrigation Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960); County of Grant v. State Bd. of Equalization & Assessment, 158 Neb. 310, 63 N.W.2d 459 (1954); Chicago, B. & Q. R.R. v. League of Neb. Municipalities, 154 Neb. 281, 47 N.W.2d 577 (1951); Effenberger v. Omaha

mission is supported by competent evidence, the action taken is not arbitrary, and is thus reasonable and will be sustained on appeal.[20] If there is a conflict in the evidence, the conflict is for the Commission to resolve rather than the court.[21] The above is the rule as ordinarily stated in the cases, but such a statement leaves many questions unanswered. For example, what does the court mean by "competent" evidence? Is the Commission at liberty to disbelieve undisputed evidence? Is merely "some" evidence sufficient or does the court require something more, such as "substantial" evidence? Is this review upon the whole record or can the court find some evidence in part of the record supporting the finding while ignoring contrary evidence in the rest of the record?

(1) Competent evidence

The phrase "competent" evidence is found in the Nebraska statute governing the admission of evidence in an administrative hearing. Section 84-914 provides:[22]

> In contested cases: (1) An agency may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

The above section is identical to the provision governing the admission of evidence in the Model State Administrative Procedure Act,[23] and the phrase can also be found in the provision of the

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& C.B. St. Ry., 150 Neb. 13, 33 N.W.2d 296 (1948); Furstenberg v. Omaha & C.B. St. Ry., 132 Neb. 562, 272 N.W.2d 756 (1937).

[20] See cases cited note 19 *supra.*

[21] Basin Truck Co. v. R. B. "Dick" Wilson, Inc., 166 Neb. 665, 90 N.W.2d 268 (1958); Publix Cars, Inc. v. Yellow Cab & Baggage Co., 130 Neb. 401 265 N.W. 234 (1936).

[22] NEB. REV. STAT. § 84-914 (Supp. 1961). For studies of provisions in other states see Harris, *Administrative Practice and Procedure: Comparative State Legislation,* 6 OKLA. L. REV. 29, 45-49 (1953); Nathanson, *Recent Statutory Developments in State Administrate Law,* 33 IOWA L. REV. 252, 268-73 (1948).

[23] MODEL ACT § 9(1). Compare this to § 7(c) of the FEDERAL ADMINISTRATIVE PROCEDURE ACT, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001 et. seq. (1958), which provides in part: "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or

Model Act governing judicial review.[24] It has been said that the word "competent," as used in the Model Act, means that some *legally* competent evidence to support the finding of fact is required.[25] This view, no doubt, expresses the proper application of the term as used in Nebraska law. It has been held that the agencies are not bound to follow strictly all common law rules of evidence, but that in order to afford the parties a full and fair hearing the agency should require its action to be supported by competent and relevant evidence.[26] By implication competent evidence would be legally competent evidence. This view seems to have been incorporated into the rules and regulations of at least one state agency.[27]

(2) Agency acceptance of testimony

Another issue is whether the agency must accept uncontroverted testimony. In some cases the refusal to believe such testimony could leave the record bare of any support for the agency's findings and thus make the agency action unreasonable and arbitrary under the present rule. In the usual case, however, where there is still evidence to support the finding of the agency, a rule that the agency cannot refuse to accept undisputed facts may be inconsistent with the rule that the court is not to substitute its judgment for that of the agency. The court has held that the Commission

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order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . ."

[24] MODEL ACT § 12(e) provides for reversal if the agency's decision is "unsupported by *competent*, material, and substantial evidence in view of the entire record as submitted." (Emphasis added.) See also § 9(6)(e) of L. B. 133, 68th Neb. Leg. Sess. (1957), note 4 *supra*, which is essentially the same as the provision in the Model Act. The phrase does not, however, appear in the corresponding section (§ 10(e)) of the FEDERAL ADMINISTRATIVE PROCEDURE ACT.

[25] Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 208 (1948). This requirement would seem to be similar to the residuum rule which requires reversal if the finding is not supported by evidence which would be admissible in a jury trial. See DAVIS §§ 14.10 to .12.

[26] Chicago & N.W. Ry. v. City of Norfolk, 157 Neb. 594, 60 N.W.2d 662 (1953).

[27] Rule 507(4) of the Rules and Regulations of the Oil and Gas Commission provides: "[A]ny evidence which is not irrelevant, immaterial, incompetent or unduly repetitious may be received and made a part of the record in the case. . . ." R. PRAC. & P. 7.1 of the Railway Commission does not use this term. For a discussion of the Rules of the Railway Commission see Comment, *New Rules of Practice and Procedure Before the Nebraska Railway Commission*, 40 NEB. L. REV. 129 (1960).

must follow the evidence where no "substantial conflict" exists,[28] and the findings of the Commission which are contrary to evidence without "substantial dispute" are "without evidentiary support and are necessarily arbitrary."[29] The question was answered in the following manner in *L. E. Whitlock Truck Serv., Inc. v. Shippers Oil Field Traffic Ass'n:*[30]

> In this respect it is the rule that where there is evidence supporting factors which are inconsistent or in conflict with other recognized factors, the power to decide ordinarily rests with the commission and not the courts. Under such circumstances this court will not substitute its judgment for that of the commission. . . . The commission may not disregard undisputed or admitted facts, although it may resolve conflicts in the evidence. The exercise of power by the commission without a proper application of the law to undisputed or admitted facts is an arbitrary exercise of power which the courts are required to correct.

If the above rule is limited to the case of documentary evidence, the rule may be well founded since such evidence would be in the record for the court to examine, and since the document would not have been disproved. However, if the question is simply one of the credibility of a witness, the situation is changed since the appellate court cannot observe the witness; and the rule may be different in this situation.[31]

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[28] Chicago & N.W. Ry. v. Save the Trains Ass'n, 167 Neb. 61, 69, 91 N.W.2d 312, 318 (1958).

[29] Chicago, B. & Q. R.R. v. Burgess, 166 Neb. 29, 31-32, 87 N.W.2d 630, 632 (1958).

[30] 171 Neb. 78, 79-80, 105 N.W.2d 588, 591 (1960).

[31] "Although the plaintiff's testimony concerning how the accident happened is not directly contradicted, triers of fact are not compelled to accept as absolute verity every statement of a witness not contradicted by direct evidence. The persuasiveness of evidence may be destroyed even though uncontroverted by direct testimony. . . . Evidence not directly contradicted is not necessarily binding on the triers of fact, and may be given no weight where it is inherently improbable, unreasonable, self-contradictory, or inconsistent with facts or circumstances in evidence. Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh undisputed parol testimony against facts and circumstances in evidence from which a conclusion may properly be drawn that the parol testimony is false." Dworak v. City of Omaha, 172 Neb. 209, 214-15, 109 N.W.2d 160, 163 (1961) (workmen's compensation case). See NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962), where the court held that the rule in NLRB v. Tex-O-Kan Flour Mills Co., 122 F.2d 433 (5th Cir. 1941), was an improper standard of review. The test under the latter case was that in reinstatement cases the employer's statement under oath must be believed unless there is impeachment or contradiction or unless there are circumstances that raise doubts as to their consistency with sworn evidence on the point. For a discussion of the issue of credibility in jury trials, see Dow,

(3) The record on appeal

In an appeal to the Supreme Court from the Railway Commission the evidence presented before the Commission, as reported by the stenographer, along with the pleadings and filings constitutes the complete record.[32] Under the Nebraska Administrative Procedure Act, the agency in a contested case must include findings of fact which consist of a concise statement of the conclusions upon each contested issue of fact.[33] The review is upon the whole record,[34] and it is difficult to see how the court could determine whether or not the action was unreasonable or arbitrary without examining the entire record. This requirement that the review be upon the whole record actually broadens the scope of review since evidence standing alone in a portion of the record supporting the agency determination is not sufficient. Contrary evidence in the rest of the record must also be considered in deciding whether the order was reasonable.

(4) Sufficiency of the evidence

The question of how much evidence is required to support the agency's determination is one which cannot be answered by resort to a phrase such as "substantial," which is the test presently used on the federal level.[35] As noted previously, there must be competent evidence to support the findings, but a requirement of competent evidence provides no guide to the question of whether merely "some" competent evidence or substantial evidence is required. The court has said that the findings and orders of the Commission will not be interfered with on appeal "if any reasonable basis exists upon which they can be supported,"[36] and that such findings cannot be disturbed unless the "result reached cannot reasonably be de-

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Judicial Determination of Credibility in Jury-Tried Actions, 38 NEB. L. REV. 835 (1959). See also Faulkner v. Simms, 68 Neb. 295, 89 N.W. 171 (1902), where Pound, Comm'r, drew a distinction between the case of oral testimony and documentary evidence in a case tried before a judge without a jury.

[32] NEB. REV. STAT. § 75-407 (Reissue 1958). The same type of provision controls in the case of the Department of Water Resources: § 46-210 (Supp. 1961).

[33] NEB. REV. STAT. § 84-915 (Supp. 1961).

[34] Chicago, B. & Q. R.R. v. League of Neb. Municipalities, 154 Neb. 281, 47 N.W.2d 577 (1951). The review on the complete record is in accord with the MODEL ACT § 12(7)(e) and the FEDERAL ADMINISTRATIVE PROCEDURE ACT § 10(e).

[35] FEDERAL ADMINISTRATIVE PROCEDURE ACT § 10(e).

[36] *In re* Application of Effenberger, 150 Neb. 13, 18, 33 N.W.2d 296, 299 (1948).

rived from the facts proved."[37] When the terms "substantial conflict" or "substantial dispute"[38] are used, it does not appear that merely some evidence, or a scintilla of evidence, is sufficient to support an agency determination. On the other hand, when the court speaks in terms of any conflict in the evidence being for the agency to determine,[39] the court would not, if it follows this rubric in practice, be involved in weighing the evidence. A case in point is *In re Application of Chicago, B. & Q. R.R.*,[40] where the only question was the sufficiency of the evidence to prove that the order denying the applicant railroad permission to discontinue service between two cities was not unreasonable or arbitrary. It was uncontradicted that the trains in question were obsolete for passenger service. Opposing this was the testimony of interested people on points such as the lack of adequate transportation for various purposes. Since, purportedly, no questions of law were presented, it is apparent that there was at least some evidence supporting the Commission's order since the record was filled with the testimony of interested parties. Despite this evidence on the effect of a discontinuance, the Commission's order denying the application was reversed by the Nebraska Supreme Court. If this were simply a question of the sufficiency of the evidence, it is obvious that more than "some" or a "scintilla" of evidence is required to support the order. If the test of "clearly wrong" as laid down in the *Byington* case were followed, there is little question as to the correctness of the result; but that test was not followed. It is clear that some evidence is not enough, but the ground between this and weighing the evidence, which the court purportedly does not do, is not clear. Is the typical determination under the test presently used by the court in reality the "substantial evidence" test followed on the federal level?

B. A Comparison of the Nebraska Rule to the Federal Tests

"Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[41] The substantial evidence test established on the federal level by the Ad-

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[37] *In re* Lincoln Traction Co., 103 Neb. 229, 244, 171 N.W. 192, 197 (1919).

[38] See notes 28 and 29 *supra*.

[39] See cases cited note 21 *supra*.

[40] 138 Neb. 767, 295 N.W. 389 (1940).

[41] NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300 (1939).

ministrative Procedure Act[42] is the same as that used for the review of jury verdicts on the federal level.[43] Assuming that the Nebraska court still follows the "clearly wrong" test enunciated in the *Byington* line of cases,[44] is that test comparable or equivalent to the substantial evidence test? In Nebraska the review of jury verdicts has in many cases been governed by the clearly wrong test,[45] and the review of a judge's findings in a law case is the same

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[42] FEDERAL ADMINISTRATIVE PROCEDURE ACT § 10(e).

[43] See DAVIS § 29.02; Jaffe, *Judicial Review: Question of Fact*, 69 HARV. L. REV. 1020 (1956); Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944).

[44] See note 16 *supra*.

[45] In Johnston v. Robertson, 171 Neb. 324, 106 N.W.2d 192 (1960), the following statement of the test was made: "The function of this court, in determining whether or not a verdict has been sustained or whether or not there is evidence sufficient for submission to a jury, is not to weigh the evidence, but to ascertain whether or not there is evidence to sustain the verdict of a jury in the exercise of its function as the trier of the facts. . . . It is not the province of this court in reviewing the record in an action at law to resolve conflicts in or weigh the evidence. In testing the sufficiency of the evidence to sustain a verdict, admissible testimony tending to support the case of the successful party should be accepted as the truth. . . . It is presumed in an action at law that controverted facts were decided by the jury in favor of the successful party, and its findings based on conflicting evidence will not be disturbed unless *clearly wrong*. . . . It has long been the rule that where different minds may draw different inferences or conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined." 171 Neb. 324, 327-28, 106 N.W.2d 192, 194-95 (1960) (Emphasis added.); *accord*, Hermansen v. Anderson Equip. Co., 174 Neb. 325, 117 N.W.2d 791 (1962); Kunkel v. Cohagen, 151 Neb. 774, 39 N.W.2d 609 (1949); Remmenga v. Selk, 150 Neb. 401, 34 N.W.2d 757 (1948); Boehler v. Kraay, 130 Neb. 233, 264 N.W. 745 (1936); McCann v. McDonald Co., 7 Neb. 305 (1878). *But see* Conley v. Hays, 153 Neb. 733, 739, 45 N.W.2d 900, 904 (1951), where the court said: "In an appeal in a jury case the function of the Supreme Court is not to weigh the evidence but only to determine whether or not there was sufficient evidence to sustain the verdict, and if the evidence is substantial and competent but in conflict and is such that reasonable minds may draw different conclusions therefrom, the verdict of a jury will not be set aside." *Accord*, Dyer v. Ilg, 156 Neb. 568, 57 N.W.2d 84 (1953). A prejudice test is often employed by the court for use in addition to the clearly wrong test. *E.g.*, Pueppka v. Iowa Mut. Ins. Co. 165 Neb. 781, 87 N.W.2d 410 (1958); Borcherding v. Elklund, 156 Neb. 196, 55 N.W.2d 643 (1952); Davis v. Security Ins. Co., 139 Neb. 730, 298 N.W. 687 (1941); Cuva v. Glens Falls Ins. Co., 136 Neb. 359, 285 N.W. 917 (1939). For a general discussion see Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

as that for review of the verdict of a jury.[46] This test may best be compared to the "clearly erroneous" test on the federal level which is the scope of review of findings of a judge without a jury.[47] On the federal level the substantial evidence test and the "clearly erroneous" test involve a different scope of review, with the scope of review under the "clearly erroneous" test being broader. This is apparent since a finding can be clearly wrong without being unreasonable.[48] The same comparison shows that Nebraska no longer follows the *Byington* case since the present test is one based upon reasonableness.

Rather than attempting to equate the state rule to the federal rule by comparing the scope of review of jury verdicts or the findings of a judge without a jury to the scope of review of administrative determinations, it is more meaningful to compare the rules in terms of the common characteristics and essential elements. As previously noted, the present rule does not appear to be the equivalent of the scope of review for jury verdicts in Nebraska. Instead, the Nebraska Supreme Court has promulgated a rule under which the agency determination will not be disturbed if it is reasonable, as distinguished from arbitrary,[49] with conflicts in the evidence being for the Commission, as the trier of fact, to resolve.[50] The court has spoken in terms of "any reasonable basis" for the action being sufficient to support the agency finding.[51] It would not seem that "reasonable basis" differs from "such relevant evidence as a reasonable mind might accept to support a conclusion."[52] A "reasonable basis" indeed requires more than arbitrary action, not as much as a clearly wrong or clearly erroneous test would require,[53] and no

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[46] Shreve v. Agricultural Prods. Co. 173 Neb. 219, 113 N.W.2d 58 (1962); State Farm Mut. Auto. Ins. Co. v. Kersey, 171 Neb. 212, 106 N.W.2d 31 (1960); Dunbier v. Stanton, 170 Neb. 541, 103 N.W.2d 797 (1960); Faltz v. Brakhage, 151 Neb. 216, 36 N.W.2d 768 (1949); *In re* Estate of Donlen, 145 Neb. 370, 16 N.W.2d 731 (1944); Bank of Roca v. Meyer, 135 Neb. 128, 280 N.W. 449 (1938).

[47] FED. R. CIV. P. 52(a). See DAVIS § 29.02; Stern, *supra* note 43. Note that this test would be the federal test under the proposed CODE OF FEDERAL ADMINISTRATIVE PROCEDURE § 1009(f). See Woll, *Administrative Law Reform: Proposals and Prospects*, 41 NEB. L. REV. 687 (1962), for a discussion of the proposed code.

[48] See Stern, *supra* note 43, at 80-81.

[49] *In re* Effenberger, 150 Neb. 13, 33 N.W.2d 296 (1948).

[50] See cases cited note 21 *supra*.

[51] *In re* Effenberger, 150 Neb. 13, 33 N.W.2d 296 (1948).

[52] See note 41 *supra*.

[53] See DAVIS § 20.02; Stern, *supra* note 43, at 81.

doubt does not involve a weighing of the evidence if conflicts in the evidence are for the agency to resolve. Of course, it may be argued that the substantial evidence test may easily become a test in which the evidence is weighed,[54] but this results from the failure to draw the necessary distinctions, rather than from the lack of a difference between the various tests. It would seem that when the Nebraska court speaks of reasonable action, as distinguished from arbitrary action, with the agency findings being reasonable if supported by sufficient evidence, there is little difference from the federal test of substantial evidence.

The entire area of the scope of review of administrative determinations in Nebraska is vague, and the rules governing such review lack precision. One reason for this is that many of the problems which can be raised have not been answered by the court. Another difficulty is that the court does not make a clear distinction between questions of law and questions of fact. The distinctions drawn and the tests followed on the federal level[55] in this respect do not appear to have been used in Nebraska. The result of this vagueness is that the state of the evidence is necessarily judged by some subjective feeling on the part of the court. This could be avoided to some extent by a more precise statement of the rule; but it cannot, and should not, be avoided completely.

II. STATUTORY APPEAL WITH THE SCOPE OF REVIEW PROVIDED BY STATUTE

Nebraska has a great many situations in which the statutes expressly provide for de novo review, or have been so interpreted. An examination of these situations should provide some insight into the use of the trial de novo and the desirability of such a broad scope of review for agency action.

It is first essential to determine the scope of de novo review. The statute may provide that the appeal shall be heard as in equity, and it is in this area that appeals from the district court to the supreme court are heard de novo. Section 25-1925 provides:[56]

> In all appeals from the district court to the supreme court in suits in equity, wherein review of some or all of the findings of fact of the district court is asked by the appellant, it shall be the duty of the supreme court to retry the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial de novo of such

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[54] See Jaffe, *supra* note 43, at 1028.

[55] See DAVIS § 30.05.

[56] NEB. REV. STAT. § 25-1925. (Reissue 1956).

> questions of fact, reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof.

These actions in equity are heard de novo subject to the rule that where credible evidence on material questions of fact is in irreconcilable conflict, the court will, in determing the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying, and must have accepted one version of the facts rather than the opposite.[57] Also it has been said that if the party upon whom the burden is imposed has failed to establish his case by a preponderance of the evidence, the court will reverse the judgment.[58] Even with these rules as a guide, there are questions which can arise, and which can make a great difference in the scope of review exercised by the court. For example, the court may have to determine whether or not an appeal to the district court which is to be heard de novo is to be considered as an equity case. If so, the review as provided by section 25-1925[59] is de novo; if not, the scope of review on appeal to the supreme court would be more limited.[60]

A. De Novo Review in Taxation Matters

One of the most litigated areas concerning de novo review involves actions by State Board of Equalization and Assessment. A direct appeal to the Supreme Court is provided in the case of the Board's assessment of railroad property. The statute provides that the court "is vested with jurisdiction to hear and determine the matter in controversy de novo upon the record so presented, and any additional evidence introduced."[61] This clearly provides for a completely independent determination upon the record, but there is a presumption attached. This was explained in *Chicago, B. &*

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[57] Dunbier v. Rafert, 170 Neb. 570, 103 N.W.2d 814 (1960); Pike v. Triska, 165 Neb. 104, 84 N.W.2d 311 (1957); Uptegrove v. Elasser, 161 Neb. 527, 74 N.W.2d 61 (1955); Sapcich v. Tangeman, 153 Neb. 506, 45 N.W.2d 478 (1951); Kuenzli v. Kuenzli, 150 Neb. 855, 36 N.W.2d 247 (1949).

[58] Trowbridge v. Donner, 152 Neb. 206, 40 N.W.2d 655 (1950).

[59] Neb. Rev. Stat. (Reissue 1956).

[60] See note 46 *supra* and accompanying text.

[61] Neb. Rev. Stat. § 77-617 (Reissue 1958). Section 77-618 provides that the court "shall adjudge and determine the assessable value" and may lower or raise the assessment as it deems "just and equitable."

Q. R.R. v. State Bd. of Equalization and Assessment, in the following manner:[62]

> There is a presumption that when an assessing authority values property for taxation purposes it acts fairly and legally upon sufficient evidence to sustain its action but the presumption disappears if there is evidence to the contrary and thereafter the reasonableness and legality of the valuation made by the assessing authority is one of fact to be determined from evidence, unaided by presumption, and the burden of showing an improper assessment is upon the complaining party.

A quite similar presumption is used by the court where the appeal is from the county board of equalization to the district court.[63] This appeal is governed by section 77-1511[64] which provides that the district court shall hear the appeal "as in equity and without a jury, and determine anew all questions raised before the county board." Also, the district court is to affirm the action taken unless it was unreasonable or arbitrary,[65] a phrase which appears to be inconsistent with the other command to "determine anew" all questions raised before the board. Also the complaining taxpayer must have "clear and convincing" proof that the finding was erroneous.[66] Since this appeal is in equity in the district court, it is heard de novo in the supreme court[67] where the review would seem to be the same as for cases appealed directly to the supreme court from an assessment of railroad property. It has been noted that the presumptions accorded the two situations are the same,[68] and, as noted above, even with de novo review the taxpayer must prove the finding erroneous by "clear and convincing" proof. This re-

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[62] 170 Neb. 77, 84, 101 N.W.2d 856, 862 (1960). Chicago & N.W. Ry. v. State Bd. of Equalization & Assessment, 170 Neb. 106, 101 N.W.2d 873 (1960), and Union P. R.R. v. State Bd. of Equalization & Assessment, 170 Neb. 139, 101 N.W.2d 892 (1960), were companion cases and are to the same effect.

[63] Baum Realty Co. v. Board of Equalization, 169 Neb. 682, 100 N.W.2d 730 (1960); Ahern v. Board of Equalization, 160 Neb. 709, 71 N.W.2d 307 (1955).

[64] NEB. REV. STAT. (Supp. 1961).

[65] NEB. REV. STAT. § 77-1511 (Supp. 1961).

[66] Newman v. County of Dawson, 167 Neb. 666, 94 N.W.2d 47 (1959); Le Dioyt v. County of Keith, 161 Neb. 615, 74 N.W.2d 455 (1956); Novak v. Board of Equalization, 145 Neb. 664, 17 N.W.2d 882 (1945), quoting with approval, First Nat'l Bank v. Webster County, 77 Neb. 815, 113 N.W. 190 (1906).

[67] NEB. REV. STAT. § 25-1925 (Reissue 1956); Newman v. County of Dawson, 167 Neb. 666, 94 N.W.2d 47 (1959); Le Dioyt v. County of Keith, 161 Neb. 615, 74 N.W.2d 455 (1956).

[68] See note 63 *supra.*

quirement of "clear and convincing" proof is of course more than a preponderance of the evidence. It is clear that a trial de novo in which the questions are decided independently of the prior decisions is not given in this situation, notwithstanding the statutory provisions, when the burden upon the complaining party is considered. This is particularly true when the statute itself provides for no reversal unless the action of the board was unreasonable or arbitrary. This is not to say that the result is undesirable; if there is actually any deviation from the statute, it may result from a recognition of administrative expertise in a complicated area.

B. Statutory Interpretation Leading to De Novo Review

There are situations in which the statute is not clear on the nature of the review to be given upon appeal since the statute provides for simply an "original" action or does not mention the type of action at all. One example of this occurred in an appeal from the State Real Estate Commission. The statute in force at the time provided for the filing of an "original action" in the district court by a license holder desiring to appeal a revocation or suspension of his license.[69] This proceeding was held to be an original action, equitable in nature, in *Feight v. State Real Estate Comm'n,* where the justification and the rules were stated as follows:[70]

> The court is required to determine only the issues thus raised. It appears therefore that it was the intent of the Legislature to provide more than a review to determine whether the order complained of was arbitrary or capricious. . . . We think the general rule is that where a review of a finding and order of an administrative officer, board, or commission is afforded by the filing of an original action in the district court, the issues to be determined are those raised by the pleadings and not those raised before the officer, board, or commission. Such a suit will be tried as any other civil action when the statute does not prescribe the procedure to be followed or limit the scope of the determination to be made.

It is to be noted that by holding the proceeding an equitable one there is de novo review in the supreme court.[71] The intent of the legislature may have been reached in this case, but the result

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[69] Neb. Laws c. 171, § 23 (1943) (now Neb. Rev. Stat. § 81-884.02 (Reissue 1958)). For another statute with the same type of provision see § 60-1415 (Reissue 1960) (Dep't of Motor Vehicles—motor vehicles dealers licensing board).

[70] 151 Neb. 867, 872-73, 39 N.W.2d 823, 826-27 (1949). This case was followed in Rhoades v. State Real Estate Comm'n, 152 Neb. 701, 42 N.W.2d 610 (1950).

[71] Neb. Rev. Stat. § 25-1925 (Reissue 1956). See note 57 *supra* and accompanying text for the rule in such cases.

may not necessarily be desirable. Perhaps this "original action" could have been viewed the same as a case in law heard by a judge without a jury, in which case the scope of review would have been limited.[72] Here there is de novo review of an administrative order made after a full hearing. Such a hearing is unnecessary duplication and tends to render the administrative procedure useless. It is doubtful whether the supreme court could have held this to be a proceeding in error[73] since the term "original" is contrary to this idea, and since the method of lodging jurisdiction in the district court was provided, thus distinguishing this case from those in which it was held that a petition in error must be used.[74] The statute now provides for de novo review upon the record and no longer allows a completely new trial, but additional evidence may be introduced.[75]

Another situation in which the statute is silent upon the nature of a hearing in the district court can be seen in *In re Iverson.*[76] Here the State Fire Marshal issued an order to defendant requiring demolition of a building. The fire marshal sought enforcement of the order under section 81-517 which merely provides that the court is to hear and determine the issues raised.[77] The court held that the hearing and determination of the issues constituted a trial in equity, rejecting the contention that the question was limited to whether or not there had been an abuse of discretion. Noting that the action was ex parte, the court said that the hearing is a "trial" of the issues made by the order and his objections, and not a review of the prior proceedings. The explanation of this holding was that:[78]

> Although the provisions of section 81-518 ["If upon such trial the order shall be sustained"] . . . when standing alone, might be

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[72] See note 46 *supra* and the accompanying text for this rule.

[73] NEB. REV. STAT. § 25-1901 *et seq.* (Reissue 1956).

[74] The right of appeal is purely statutory and unless the statute provides for an appeal, such a right does not exist. The failure of the statute to provide for any procedural method for lodging jurisdiction in the district court defeats the right of appeal. From v. Sutton, 156 Neb. 411, 56 N.W.2d 441 (1953).

[75] NEB. REV. STAT. § 81-884.02 (Reissue 1958); Gillespie v. State Real Estate Comm'n, 172 Neb. 308, 109 N.W.2d 305 (1961).

[76] 151 Neb. 802, 39 N.W.2d 797 (1949).

[77] NEB. REV. STAT. § 81-517 (Reissue 1958) which provides, in part: "[I]f an answer be filed and served as herein provided, the court shall hear and determine the issues so raised and give judgment thereon as herein provided."

[78] *In re* Iverson, 151 Neb. 802, 807, 39 N.W.2d 797, 800 (1949).

> construed to limit the judgment of the court either to sustain or set aside the order of the State Fire Marshal, yet the statutes when considered in their several provisions do not justify that conclusion. The legislative policy contemplates that the owner shall have a trial and a determination on the merits in the district court. Although the statute does not so define the proceeding, it appears that the powers conferred upon the court are those which are generally classed as equitable, as distinguished from actions at law.

Here as in *Feight,* there is de novo review as a result of statutory interpretation. In this case the review given may well be justified for several reasons. It involves an ex parte order rather than a finding based upon the evidence acquired in a full hearing where each party has an opportunity to present his case, as was the situation in *Feight.* This case involved an action to enforce an order rather than any type of appeal, and in such case a petition in error (which is a method of appeal) would not be appropriate.[79] Any other holding could not have given the review which the legislature obviously intended. In both the *Feight* and *Iverson* cases the court may have gone to some lengths to find that de novo review was proper in scope. The statutory provisions in such cases presented a serious dilemma for the supreme court, and there was no reasonable alternative to the actual holdings. The result itself was not necessarily undesirable in the *Iverson* case, but in *Feight* the review given is very broad considering the type of administrative proceeding concerned.

The cases discussed above illustrate the type of statutory problems which may arise, and the broad review which can result. In addition, there are a number of statutory provisions regarding the scope of review which are very unclear. These provisions are usually either meaningless, or often contradictory, and almost always present difficult questions of interpretation. One example, which is unlike any other Nebraska provision, is the scope of review on appeal from the Department of Agriculture and Inspection when the license of the operator of a mobile home court has been denied or revoked. Here the "ruling, decision, or order of the department . . . shall be as final and binding as the final order or judgment of a court of general jurisdiction"; but the appeal is heard as in equity and the district court is to determine anew all questions raised before the director of the department.[80] Although it is not expressly provided, a trial de novo is obviously contemplated. The provision referring to the same review as in courts of general jurisdiction is very questionable. The only possible reconciliation would be

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[79] See note 74 *supra.*

[80] NEB. REV. STAT. § 81-2,205 (Reissue 1958).

to interpret the "final order or judgment of a court of general jurisdiction" as a finding of a judge in an equity case. This provision is, of course, an extreme example of the type of statutory review in this area, but other examples of confusing statutory provisions may be found.[81]

C. VARIOUS STATUTORY TESTS DEFINING THE SCOPE OF REVIEW

Another difficulty with statutory provisions in this area is the great variety of tests used to describe the scope of review to be followed. A survey of some of these various statutes will show the difficulties involved if an authoritative interpretation should be required, and this situation presents a strong argument for a uniform statutory standard. One test used is "abuse of discretion" which is found in the Nebraska "Blue-Sky" Law.[82] "Unlawful and unreasonable" standards govern the scope of review on appeals from the Board of Barber Examiners with the Department of Health;[83] but within the same department, on appeals from the Board of Examiners in Basic Sciences, the phrase without "just cause" is to be used in appeals from a denial of an examination.[84] On appeal from the Auction Livestock Market Board to the district court, the court "shall not substitute its discretion for that of the board but shall determine whether the board acted capriciously, arbitrarily, or abused its discretion and whether it acted according to law."[85] Even the federal test of "substantial evidence" is used in the provisions for the scope of review,[86] but to offset this test is the provision that the findings made by the Board of Cosmetologist

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[81] See NEB. REV. STAT. § 46-805 (Reissue 1960). This statute states that the appeal "shall be heard and determined upon proofs by the applicant and the department." It was held in Lackaff v. Department of Roads and Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950), that this appeal is within the rule of the *Iverson* case and is heard as in equity.

[82] NEB. REV. STAT. § 81-328 (Reissue 1958). Upon this appeal, "merely technical irregularities . . . shall be disregarded . . . and the court shall receive and consider any relevant evidence . . . but shall be limited to the consideration and determination of the question whether there has been an abuse of discretion. . . ." See Robertson, *Administrative Control Over Security Issues in Nebraska,* 11 NEB. L. BULL. 116, 170 (1932).

[83] NEB. REV. STAT. § 71-235 (Reissue 1958). Note that this standard may not be any different than that for review of the determinations of the State Railway Commission. See note 19 *supra.*

[84] NEB. REV. STAT. § 71-409 (Reissue 1958).

[85] NEB. REV. STAT. § 54-1140 (Supp. 1961).

[86] NEB. REV. STAT. § 81-263.16 (Supp. 1961) (Grade A Milk Law). "The court shall set aside the order . . . if it finds that [it is] not in accordance with law or . . . not supported by substantial evidence."

Examiners acting within its power, are conclusive "in the absence of fraud."[87] The above illustrations are exceptions to the general statutory provisions for de novo review. The latter are worded somewhat differently, but undoubtedly they all provide for de novo review upon the record. The statute may provide for the appeal to be heard as "in equity, and without a jury,"[88] simply "in equity,"[89] "de novo" in the manner of suits in equity,[90] or simply "de novo."[91] The result is exactly the same despite the phraseology differences, except that some of the statutes could be interpreted to allow a completely new trial, or go beyond a trial de novo on the record, since additional evidence may be introduced. Workmen's compensation is another area in which de novo review is granted,[92] and appeals from the Department of Labor in the area of employment security are de novo upon the record.[93]

D. De Novo Review—A Critical View

Serious objections to the broad scope of review granted in many situations may be raised. These objections sometimes lead a court to restrict the review given under statutes which purport to

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[87] Neb. Rev. Stat. § 71-339 (Supp. 1961). The statute, however, goes on to provide that "the district court . . . shall have the power to review such proceedings in accordance with the laws of this state. . . ."

[88] Neb. Rev. Stat. § 45-150 (Reissue 1960) (Dep't of Banking); § 44-154 (Reissue 1960) (Dep't of Insurance); § 60-420 (Reissue 1960) (Dep't of Motor Vehicles—"determine anew all questions raised").

[89] Neb. Rev. Stat. § 60-503 (Reissue 1960) (Dep't of Motor Vehicles); § 75-611 (Reissue 1958) (Bd. of Educational Lands and Funds).

[90] Neb. Rev. Stat. § 1-149 (Reissue 1962) (Bd. of Public Accountancy—heard and tried de novo in the manner provided for trial of suits in equity, but additional testimony may be introduced); § 44-1441 (Reissue 1960) (Dep't of Insurance); § 44-1485 (Reissue 1960) (Dep't of Insurance); § 53-1,116 (Reissue 1960) (State Liquor Comm'n—additional testimony may be introduced); § 59-303 (Reissue 1960) (Dep't of Insurance).

[91] Neb. Rev. Stat. § 57-913 (Supp. 1961) (Oil and Gas Conservation Comm'n); § 71-159 (Reissue 1958) (Dep't of Health).

[92] The workmen's compensation area has been extensively discussed. See II Fisher, Courts of Limited Jurisdiction in Nebraska §§ 725-27 (1950); Cashen, *Practice and Procedure Before Nebraska Workmen's Compensation Court,* 41 Neb. L. Rev. 151, 165-68 (1961); Cashen, *Appeals From Courts of Limited Jurisdiction to State District Court,* 41 Neb. L. Rev. 410, 424-30 (1962). For a discussion of de novo review in this area see Dodd, Administration of Workmen's Compensation 358-85 (1936).

[93] Neb. Rev. Stat. § 48-639 (Reissue 1960). The appeal to the Supreme Court is taken in the same manner as appeals arising under the workmen's compensation law.

grant de novo review,[94] and such a restricted interpretation in some states serves to prevent problems involving the doctrine of separation of powers.[95] The advisability of this type of extensive review is rarely discussed by the courts, and a serious study of the situation could well lead to a judicial reluctance to grant such review in situations where a full administrative hearing has been held. The entire concept of administrative expertise and discretion is buried when a complete de novo review is allowed. The duplicate independent determinations waste time and the litigant's money, and render the administrative procedures often times useless. If the administrative agency has the burden of implementing consistent policies, extensive judicial review may be a severe handicap.[96] Even if de novo review is limited to the record, most of the same objections apply with equal vigor. There are situations in which extensive review is both essential and highly desirable. If the administrative action is ex parte, and without a hearing, the arguments in favor of de novo review are very persuasive.[97] Without the administrative record an independent judicial inquiry is essential, but in the situation in which there has been a full administrative hearing and a record made, a trial de novo is an unwarranted and unnecessary judicial control.[98]

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[94] See the illustration of appeals from the State Board of Equalization and Assessment. See 4 DAVIS, ADMINISTRATIVE LAW § 2907 (1958).

[95] See Note, *De Novo Judicial Review of State Administrative Findings*, 65 HARV. L. REV. 1217, 1222 (1952). See also Baird, *Judicial Review of Administrative Procedures in Minnesota*, 46 MINN. L. REV. 451, 477 (1962).

[96] For a good treatment of this type of situation see Davis, *Judicial Emasculation of Administrative Action and Oil Proration: Another View*, 19 TEX. L. REV. 29, 42 (1940).

[97] If the administrative action is ex parte, the courts are much more disposed to allow extensive review. See the *Iverson* case discussed previously in text at note 76 *supra*. See Note, *Judicial Review of Administrative Adjudicatory Action Taken Without a Hearing*, 70 HARV. L. REV. 698 (1957), in which this idea is fully developed. Professor Jaffee of Harvard concurs with this view; Jaffee, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953, 967 n.48 (1957). Professor Merrill would also seem to agree with this approach. See Merrill, *Judicial Review of Administrative Proceedings, A Functional Prospectus*, 23 NEB. L. REV. 56, 73 (1944).

[98] Merrill, *supra* note 97, at 72-73, condemns the de novo trial in these terms: "There is no good reason why review upon the administrative record may not be made equally efficient to that resulting from de novo hearing. . . . Hence de novo trial does not seem an indispensable safeguard against arbitrary acts. . . . Accordingly, it is suggested that, viewing the problem in the light of governmental expediency, dissociated

III. THE PETITION IN ERROR

In addition to the situations in which there is a statutory provision for appeal there are many situations in which such an appeal is not provided, or in which the method of appeal is unclear. This type of situation is found primarily in cases where the administrative action is that of a local body rather than a state agency. The law in this area is stated in *From v. Sutton*:[99]

> [T]he Legislature intended, by the statute it enacted, to extend to any parties coming within the scope thereof the right to an appeal which would entitle them to a retrial of the whole cause but failed to provide any procedural method for lodging jurisdiction thereof in the district court. This failure of the statute to so provide defeats the right for, as already stated, the right to appeal together with the mode and manner thereof are purely statutory.

Since the right is purely statutory, appeals from agencies, such as local administrative bodies or officials, must be either by a petition in error[100] or, perhaps, by one of the extraordinary remedies such as mandamus or injunction. Even if the parties would stipulate that the case should be considered and tried as an appeal proceeding or as an original action, the district court would still not have jurisdiction to hear the case except as a proceeding in error.[101] This method of obtaining judicial review has been used in a great variety of situations,[102] and the question here is the scope of judicial review available in this type of proceeding.

Section 25-1901[103] provides that a judgment or final order made by a county court, justice of the peace or "any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court" may be reversed, vacated or modified by the district court. This statute contains no provision concerning the

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from existing decisions, the de novo trial of fact issues of any sort in the review of administrative action, taken after an adequate hearing, should be abandoned."

[99] 156 Neb. 411, 414, 56 N.W.2d 441, 443 (1953); *accord*, Elliott v. City of Auburn, 172 Neb. 1, 108 N.W.2d 328 (1961); Jungman v. Collidge, 157 Neb. 122, 58 N.W.2d 828 (1953); Roberts v. City of Mitchell, 131 Neb. 672, 269 N.W. 515 (1936). NEB. REV. STAT. § 44-1032 (Reissue 1960) and § 79-1544 (Reissue 1958) would seem to fall within this rule.

[100] NEB. REV. STAT. § 25-1901 (Reissue 1956). The appeal provision for the Department of Aeronautics provides for error proceedings. NEB. REV. STAT. § 3-140 (Reissue 1962).

[101] Roberts v. City of Mitchell, 131 Neb. 672, 269 N.W. 515 (1936).

[102] See II FISHER, COURTS OF LIMITED JURISDICTION IN NEBRASKA § 468 (1950). The petition in error is discussed fully in this work, §§ 468-76.

[103] NEB. REV. STAT. (Reissue 1956). A final order is defined in § 25-1902.

type of hearing in the district court. But in error proceedings from the county court and the justice of the peace the procedure is the same as though the action had been originally instituted in the district court, and the case is retained for trial on the merits if there is a reversal of the judgment on other than jurisdictional grounds.[104] However, in the case of appeals from tribunals or boards the review does not seem to be the same. In *Mathews v. Hedlunk*[105] error proceedings were brought to review the order of the State Board of Health cancelling the defendant's license to practice medicine. Concerning the rule to be used in reviewing the order, the court stated:[106]

> [I]n error proceedings prosecuted to the district court from a final order of the state board of health, the judgment should be affirmed if all of the jurisdictional facts were established by any competent evidence, even though opposed by other and weighty evidence. In referring to the evidence as "competent" we mean evidence for that character of proceedings.

In *Mathews* the court also approved a rule from a previous case in which it was held that the findings would not be disturbed unless it clearly appears that there is no evidence to uphold them.[107] The above standard seems to have developed into a rule quite similar to that used in reviewing the findings of the State Railway Commission.[108] In one recent case, *Lynch v. City of Omaha*, it was decided that if the agency is within its jurisdiction, and if the jurisdictional facts essential to uphold its findings are sustained by some competent evidence, the findings will be upheld.[109] Another case, decided

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[104] NEB. REV. STAT. § 24-544 (Reissue 1956) and § 27-1305 (Reissue 1956). Rogers v. Bodie, 112 Neb. 672, 200 N.W. 799 (1924).

[105] 82 Neb. 825, 119 N.W. 17 (1908).

[106] *Id.* at 833, 119 N.W. at 20.

[107] Munk v. Frink, 81 Neb. 631, 116 N.W. 525 (1908).

[108] The rule here is that the orders will not be reversed if the agency is within the scope of its authority and if the order was reasonable and not arbitrary. The action is not arbitrary and is reasonable if it is supported by competent evidence. See notes 19 and 20 *supra.*

[109] "In error proceedings taken from findings and orders of an administrative agency or body acting in a quasi-judicial capacity, as in the case at bar, only two questions are ordinarily presented for decision. The general rule is that if it appears in such cases that such agency or body has acted within its judisdiction and that all of the jurisdictional facts essential to uphold its findings and orders are sustained by some competent evidence, such findings and orders will be upheld in error proceedings to the district court and on appeal to this court." Lynch v. City of Omaha, 153 Neb. 147, 150-51, 43 N.W.2d 589, 591-92 (1950). The court followed Mathews v. Hedlunk, 82 Neb. 825, 119 N.W. 17 (1908), and Munk v. Frink, 81 Neb. 631, 116 N.W. 525 (1908).

the same year, held that if the order is not arbitrary or capricious it will be upheld, and stated that if there is evidence to sustain the finding it is not unreasonable.[110]

While these cases may have developed a rule which is the equivalent of the rubric presently employed by the supreme court in cases appealed from the Railway Commission, there are great difficulties involved with its application. It is subject to the same questions as the rule used in appeals from the Commission, in addition to special problems in this area. The exact meaning of the phrase "jurisdictional facts" is difficult to ascertain. In some of the cases the term does not appear,[111] but it is used in *Mathews* and *Lynch*. The phrase was most recently discussed by the supreme court in *Elliott v. City of Auburn*, a collateral attack rather than an error proceeding, where the court stated:[112]

> The city council was the proper party to determine in the first instance whether or not the petition presented to it was signed by the required number of property owners. The power to determine that question was judicial. Its determination of the question was made within the scope of the subject matter over which its authority extended and, the council having decided that the facts existed which were necessary to give it jurisdiction to act, the finding is conclusive and cannot be collaterally attacked even though the finding may have been erroneous.

The above statement defining a jurisdictional fact would seem to be the same as the view on the federal level where jurisdictional facts are those whose "existence is a condition precedent to the operation of the statutory scheme"[113] the determination of which must be left for the courts. *Elliott*, while not an error proceeding, does provide some insight into what a jurisdictional fact is and makes it clear that such facts cannot be collaterally attacked; but in an error proceeding, jurisdictional facts are reviewable according to *Mathews* and *Lynch*, and such facts in error proceedings would seem to be the same as those discussed in *Elliott*. The similarity of this concept in Nebraska to the concept once

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[110] Lewis v. City of Omaha, 153 Neb. 11, 43 N.W.2d 419 (1950). The court here also approved Mathews v. Hedlunk, *supra* note 109.

[111] The phrase is not used in Lewis v. City of Omaha, *supra* note 110, or in Munk v. Frink, 81 Neb. 631, 116 N.W. 525 (1908).

[112] 172 Neb. 1, 11-12, 108 N.W.2d 328, 334 (1961).

[113] Crowell v. Benson, 285 U.S. 22, 54 (1932). See 4 DAVIS, ADMINISTRATIVE LAW § 29.08 (1958); Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932); Jaffee, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 HARV. L. REV. 953 (1957); Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. PA. L. REV. 163 (1949).

used on the federal level is of little help for, in the words of Professor Davis, "apparently no one has ever succeeded in ascertaining the difference between fundamental or jurisdictional facts and other facts."[114] The use of such a term in the opinions is unfortunate, but perhaps not fatal, when the review given the findings of jurisdictional facts is considered. However, when these facts are reviewed, the rule here is far from equivalent to the rule used on appeal from the Railway Commission; and the cases which do not use the phrase "jurisdictional fact" are completely irreconcilable with the concept. Under either view the scope of review is quite narrow and is far from an independent determination by the court. The determination of what actions are judicial or quasi-judicial is necessary, and this question is not much easier to answer than the question concerning "jurisdictional facts."

In this area, as in the area of appeals from the Railway Commission, there are cases which indicate that the scope of review is the same as that for the review of jury verdicts. In *From v. Sutton* the court quoted with approval the following: "In such error proceedings the orders of the county board will be given the same weight and conclusiveness as the verdict of a jury, or the findings and judgment of a court, and will not be reversed or set aside unless it clearly appears that the evidence fails to sustain them."[115] In *From* the parties had in effect lodged the action in the district court by error proceedings, and the district court was, upon remand, to consider the case on that basis rather than granting a retrial of the whole cause as the district court had done previously. This type of review on the record is, of course, the rule promulgated in the *Byington* case,[116] and the two sets of rules are no easier to reconcile in this area than they were in the area of appeals from the Railway Commission. Perhaps, in this area, the distinction could be drawn between judicial acts and non-judicial acts with the result being a different test for the two, but the statute providing for petition in error uses the phrase "exercising judicial functions."[117] However, if this statute is limited to agencies or tribunals exercising judicial functions, no appeal of any type whatsoever

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[114] DAVIS, ADMINISTRATIVE LAW § 29.08 at 158-59 (1958).

[115] 156 Neb. 411, 418, 56 N.W.2d 441, 445 (1953), quoting Dodge County v. Acom, 72 Neb. 71, 72, 100 N.W. 136 (1904). For the test in the case of jury verdicts see note 45 *supra* and accompanying text.

[116] See note 15 *supra* and accompanying text.

[117] NEB. REV. STAT. § 25-1901 (Reissue 1956).

would be allowed from a board exercising executive functions if no statutory appeal exists for that board, since the right to appeal is purely statutory and the petition in error could not be used.

IV. CONCLUSION

The precise limits of the rules governing the scope of review for administrative determinations in Nebraska are difficult to ascertain, but this is not unusual, nor is a charge of vagueness necessarily an insurmountable objection. Some degree of flexibility is desirable and essential. However, lack of precision in the rules leads to the conclusion that often the court must judge the evidence subjectively. Despite the many unanswered questions in this area, adoption of the federal "substantial evidence" test is not necessarily the solution. A recognition by the court of the problems raised by the present test is necessary if a more precise rule is to be developed.

De novo review which is allowed in a great many cases by statute is at times unwarranted and undesirable, but in cases where there has been no administrative hearing and no record, an independent judicial determination is essential to safeguard the rights of the parties and to prevent arbitrary ex parte action. In this area, as well as in the cases where petition in error is the only available remedy, legislative action is sorely needed. A uniform method of appeal and a general statutory provision such as the provision in the Model Act may be the answer. However, de novo review should not be allowed in all cases, and the "no-man's" land of the petition in error should be included in any statutory changes. The introduction of additional methods of appeal or additional rules governing the scope of review should be studiously avoided, and the wide variations in both method of appeal and the scope of review from agency to agency should be eliminated. The problem of promulgating uniform provisions in this area where procedures are quite diverse, and actions taken are of every variety, are not denied. Nevertheless, the difficulties involved in changing rules, and the variations in procedures and types of actions, should not prevent litigants from obtaining adequate judicial review.

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