

ADMINISTRATIVE REVIEW AND THE OHIO MODERN COURTS AMENDMENT

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When administrative activity is questioned in court, statutory interpretation almost certainly ensues. When this interpretation takes the form of reading a statute to determine the scope of the jurisdiction of the court, such a reading will be done in a context of strain because of questions about the relationship between the courts and the legislature. These questions are of high moment because they bear upon two branches of government, each of which carries a constitutional endowment of independence within its own sphere. This independence is reflected in the Ohio supreme court's unwillingness to abandon its natural concern for justiciability as an essential element of the court's business despite the existence of seemingly liberal court-opening statutes providing for administrative review.

Prior to 1968, the Ohio constitution granted to the supreme court "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."¹ Although the constitution then made no specific provision for administrative review by the lower state courts, it did grant to the common pleas courts jurisdiction as "fixed by law."² Pursuant to this authorization the General Assembly enacted two statutes, one providing review by the court of common pleas of "every final order, adjudication or decision of any officer, tribunal . . . or other division of any political subdivision of the state,"³ and the other, part of the Administrative Procedure Act, providing review in the Court of Common Pleas of Franklin County for "any person adversely affected by an order of an agency in adopting, amending or rescinding a rule."⁴ As enabling

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¹ OHIO CONST., art. IV, § 2 (1851).

² OHIO CONST., art. IV, § 4 (1851).

³ OHIO REV. CODE ANN. § 2506.01 (Page supp. 1972), which provides:

Every final order, adjudication, or decision of any officer, department or other division of any political subdivision of the state may be reviewed by the common pleas court of the county in which the principal office of the political subdivision is located. . . .

The appeal provided in sections 2506.01 to 2506.04, inclusive, of the Revised Code is in addition to any other remedy of appeal provided by law.

Not covered as a final order, adjudication, or decision are orders from which there is an appeal and hearing before a higher administrative authority, orders which do not constitute a determination of the rights, duties, privileges, benefits, or legal relationships of a specified person, and orders issued preliminary to or as a result of a criminal proceeding. *Id.*

⁴ OHIO REV. CODE ANN. § 119.11 (Page 1953), which provides:

Any person adversely affected by an order of an agency in adopting, amend-

legislation these statutes *seem* to grant very broad jurisdictional power to the lower courts; however such is not the case. In *Zangerle v. Evatt* the Ohio supreme court held that the term "proceedings," as used in its own constitutional grant to revise administrative decisions, was technical in meaning and encompassed only those proceedings which were *quasi-judicial*.⁵ Thus, as subsequently defined, the revisory jurisdiction of the courts under the review statutes can extend only to those proceedings that include notice to the aggrieved person, a hearing, and an opportunity to introduce evidence.⁶ For all other proceedings the courts are limited to deciding whether the particular administrative rule is "reasonable and lawful as applied to the facts of a particular *justiciable* case."⁷

On May 7, 1968, the Ohio voters adopted the Modern Courts Amendment to the constitution and thereby furnished a new tool for determining the sphere of judicial review.⁸ The amendment made only a minor change to supreme court jurisdiction, adding "or agencies" to the existing grant of review over administrative officers, but it made a more substantial change in respect to common pleas, with this entirely new language: "The courts of common pleas shall have such original jurisdiction over all *justiciable matters* and such powers of review of *proceedings* of administrative officers as may be provided by law."⁹ Syntactically, the amendment could be interpreted to eliminate justiciability as a prerequisite to administrative review in common pleas courts. That is, the word justiciable appears to limit only the matters over which the court has "original jurisdiction," while there is no such limitation upon the proceedings over which the court has "review" power. The supreme

ing, or rescinding a rule . . . may appeal to the court of common pleas of Franklin county on the ground that said agency failed to comply with the law in adopting, amending, rescinding, publishing, or distributing said rule, or that the rule as adopted or amended by the agency is unreasonable or unlawful, or that the rescission of the rule was unreasonable or unlawful.

Appeals from orders issued pursuant to certain types of adjudication are governed by OHIO REV. CODE ANN. § 119.12 (Page 1969). The agencies covered by both sections are defined in § 119.01(A).

⁵ 139 Ohio St. 563, 41 N.E.2d 369 (1942). *Zangerle* involved the revisory jurisdiction of the supreme court under the constitution, art. IV, § 2, as applied to a rule by the tax commissioner for classifying taxable property. The rule was previously found reasonable after a hearing by the board of tax appeals, and the auditors of two counties pursued an appeal. But the court *sua sponte* dismissed them on the ground that the administrative proceedings were not *quasi-judicial* and were consequently outside both the constitutional and statutory jurisdiction of the court.

⁶ *M. J. Kelly Co. v. Cleveland*, 32 Ohio St. 2d 150, 290 N.E.2d 563 (1972).

⁷ *Zangerle v. Evatt*, 139 Ohio St. 563, 41 N.E.2d 369 (1942) (syllabus of the court, emphasis added). The auditors offered evidence of the effects of the rule upon the oil company taxpayers, but the taxpayers were not parties nor had they appeared before the board of tax appeals.

⁸ OHIO CONST. art. IV, § 2(B)(2)(c).

⁹ OHIO CONST. art. IV, § 4(B) (emphasis added).

court, however, has continued to insist upon justiciability for review cases, as well as others. The 1968 amendment was promptly found to restrict application of the administrative review statutes, and attempts by plaintiffs to invoke the court's jurisdiction failed for lack of a case.¹⁰ Misunderstanding the meaning of "proceedings" has sprung a trap upon the unwary plaintiff who would have had no doubt that the General Assembly had used in each statute words apt for his purpose in seeking judicial review.

The discussion here will not undertake an examination of the original question whether the constitutional term "proceedings" should have been given restrictive meaning in relation to common pleas jurisdiction. The accumulation of cases appears to entrench this meaning to the point that the profession is justified in relying upon it. In addition, concern over an appropriate meaning is unlikely to become a matter of such political interest as to prompt further constitutional amendment. Rather, this article is devoted to two objects. The first is an effort to explain what effect the selected cases have on the standing of a person to contest administrative authority in court. The second object is to develop an argument that a plaintiff who has unsuccessfully sought to invoke either of the two review statutes may nonetheless properly be in court and entitled to contest an administrative determination, even if there have been no proceedings of any description. This argument must be advanced because the Ohio supreme court has left its judgments unclear, in that its opinions have expressed consistent holdings about jurisdiction of the subject matter that do not necessarily support the orders disposing of the appeals. That is, by analogy, if a plaintiff fails to make proper service of process upon the defendant, such that no jurisdiction of the person is acquired, an order dismissing the action leaves no doubt as to the holding in the case. By contrast the fact that a plaintiff in common pleas has not attended to, or has misconceived the force of, "proceedings" in the 1968 amendment is not in itself determinative of whether he has successfully invoked the subject matter jurisdiction of a court of general jurisdiction: an order dismissing the action does not follow from the interpretation given "proceedings" by the holding in the case.¹¹

The ideal of equality before the law has endowed the common law tradition with wholesome skepticism of the administrator or program specialist, especially if the administrator also wields political authority.

¹⁰ E.g., *Fortner v. Thomas*, 22 Ohio St. 2d 13, 257 N.E.2d 371 (1970).

¹¹ For additional analysis of recent case law concerning administrative review, see Note, *Judicial Review of Administrative Decisions in Ohio*, 34 OHIO ST. L.J. 853 (1973).

Guided by this ideal, the common law, later supplemented by statutes, developed procedures for the review of administrative determinations. These procedures include either re-trying the underlying factual issues, if any, or attributing some degree of finality to the administrative determination. Outside the Anglo-American system review is conducted exclusively by administrative authority, or in effect the administration has its own judicature. However in the United States review is accomplished through the courts, a lay judicature pretending to no special expertise in administrative matters.¹²

If the judges are laymen, in contrast to the administrators or program specialists, how does this limit the scope of the court's review? According to accepted doctrine the court is not to determine administrative policy, but rather the court is to determine whether an individual subjected to regulation has a court case against the administrator. As an examination of the following cases will indicate, the power of the court is measured by the amount of discretion granted to the decisions of each administrative body by the legislature.¹³ How then does a teacher compare with a public works bidder, with a barkeeper, with a brewer, in the attempt by each to obtain judicial review of an administrative determination? If there are differences among them, equality before the law would require that the differences be attributable not to the courts, but to the legislature and policies enacted within its constitutional discretion.

Susan DeLong had a "limited contract" for a term of three years with the Southwest School District in Hamilton County, Ohio. When her contract came up for renewal her superintendent recommended extension of tenure, but the school board unanimously voted against re-employment. In doing so, the school board was acting pursuant to state statutes which allow the board, by a three fourths vote, to reject the superintendent's recommendation and which allow the board to act without giving the teacher an opportunity to be heard. Although the determination by the board was *quasi-judicial*, in that it amounted to enforcement of school

¹²The unique position of the Court of Common Pleas of Franklin County as the only lower state court to which administrative review is permitted under the Administrative Procedure Act might be considered a partial adoption of the Continental approach, yet this court is part of the lay judicature.

¹³When the court determines whether a rule should be set aside, it is not implicated in the formulation of a rule. The officer or agency continues to be charged with that function. The court merely determines whether the plaintiff must either wait or pursue administrative adjudication, or whether he may now have relief in court. Whether such relief must be judicial declaration of the nullity of the rule or may extend to its modification depends upon judicial doctrines of severability and scope of administrative discretion concerning remedy. In addition the statute endowing the officer or agency with discretion to make rules and the constitutional scope of the legislature to authorize rule making by other officers must be considered.

law, it was made without *quasi*-judicial procedure. Without conducting a hearing the board determined the teacher's rights.

Miss DeLong contended that a vested statutory right had been abridged and sought judicial review of the board's determination. However in *DeLong v. Board of Education*,¹⁴ a short, two-branched opinion, the Ohio supreme court affirmed the dismissal of her suit. In the first branch the court adhered to its traditional approach and held that review was not possible because the proceeding before the school board had not been *quasi*-judicial.¹⁵ The more significant portion of the opinion is the second or alternative branch in which the court proceeded to the merits of the claim. The statutes were held not to create any rights in the teacher, but rather to preserve for the school board "the final say in all re-employment situations."¹⁶ The General Assembly had lodged the discretion in the school board, and the questions of fact underlying the determination not to renew the contract were the exclusive business of the board: it has "the final say." Miss DeLong did enjoy standing, under the second branch of the opinion, to have the court ascertain the applicable statute and apply it to her case. And this occurred without a constitutional challenge to the distribution of power between the superintendent and the school board or to the lack of a hearing for the teacher. Nor was there a claim of corruption, bias, conflict-of-interest, or denial of constitutional rights on the part of the board.

The willingness of the court in *DeLong* to recognize standing is a significant departure from its earlier decision in *M. J. Kelley Co. v. Cleveland*,¹⁷ also an action for review under the local administration statute. The M. J. Kelley Co. failed to get a contract to improve and expand utilities in the City of Cleveland. Although Kelley Co. had submitted a bid of \$123,029, the city board of control instead awarded the work to Henry B. Sherman, Inc., which bid \$154,690. This apparent assault upon the taxpayer was unexplained—not even political favoritism was alleged. However the terms of the bidding were set by city council, which specified that it was to be "competitive" and that award should go to the "lowest responsible bidder." Although the inference about DeLong is that she was not as good a teacher as the board thought it could find to replace her, there is no room for inference about how cheaply the Kelley firm would work, rather the inference is that the board of control considered the Sherman firm to be on the order of \$30,000

¹⁴ 36 Ohio St. 2d 62, 303 N.E.2d 890 (1973).

¹⁵ *Id.* at 64, 303 N.E.2d at 892.

¹⁶ *Id.*

¹⁷ 32 Ohio St. 2d 150, 290 N.E.2d 562 (1972).

worth "more responsible." If administrative bodies are endowed with unreviewable discretionary powers, then both inferences, including questions of their reasonableness and factual bases, should belong to the local administration, not to the judge of the court of common pleas.

Nothing in the *Kelley* opinion indicates that the supreme court read the city ordinance as a grant by the legislative arm (city council) of final decision-making authority to the board of control. Rather the opinion by the chief justice hews to earlier precedent,¹⁸ which also served as the basis for the first branch of the decision in *DeLong*. That is, since the board of control was not required to give advance notice of its meeting or to have bidders present at its meeting or to take testimony or to hold a hearing, its action was not *quasi-judicial*, and the court had no review jurisdiction.¹⁹ The supreme court affirmed the trial court's dismissal of the appeal, although it rejected the characterization of the trial court, which viewed the determination as "legislative."²⁰ That is, the supreme court based its decision on the nature of the proceeding, *quasi-legislative*, whereas the trial court based its decision on the nature of the activity performed, legislation or rule-making.

But it is reasonably certain in *Kelley* that the city council had completely performed the legislative process when it set forth the "lowest responsible bidder" requirement and that the trial court in characterizing the board's award as legislative was conceptually incorrect. There is nothing to show that the board was determining policy. Rather, it was carrying it out, an aspect of administration normally subject to judicial scrutiny at the behest of a party having standing.²¹ It is hardly open to argument, at least until this case, that if a plaintiff or relator is prepared to show legal injury by an official (or can show even "private attorney general" status created by statute²²), standing obtains. The ideal

¹⁸ *Fortner v. Thomas*, 22 Ohio St. 2d 13, 257 N.E.2d 371 (1970).

¹⁹ 32 Ohio St. 2d at 154, 290 N.E.2d at 565.

²⁰ *Id.* at 152, 290 N.E.2d at 563. The trial court relied upon prior supreme court precedent, *Tuber v. Perkins*, 6 Ohio St. 2d 155, 216 N.E.2d 877 (1966), wherein it was stated, "[the local administration statute] relates to appeals from administrative orders of such bodies; it does not provide for appeals from legislative bodies or from resolutions of administrative bodies promulgated in a delegated legislative capacity." *Id.* at 156, 216 N.E.2d at 878. The supreme court in *Kelley* concedes that the quoted language from *Tuber* "indicates that an administrative act is appealable;" however it qualifies that appealability by requiring that the act be a result of a *quasi-judicial* proceeding. 32 Ohio St. 2d at 152-53, 290 N.E.2d at 564.

²¹ In *Zangerle v. Evatt*, 139 Ohio St. 563, 41 N.E.2d 639 (1942), the auditors did not qualify as parties adverse to the rule by seeking to demonstrate impact upon the oil companies, although this impact would in turn produce a loss in revenues for the counties in which the oil companies were located. The court's emphasis upon the oil companies' not having been parties implies that the auditors were not "private attorneys general" in the sense that they would have standing to demonstrate that their respective counties were aggrieved.

²² For recent developments in the federal law of standing, see *Association of Data Proc.*

of equality before the law is radically inconsistent with judicial timidity inspired by no more than the imposing cloak of official authority the defendant seeks to draw around himself. The state officer or agency is only another defendant, just as the county prosecutor is only another plaintiff.

Although neither the trial court nor the supreme court opinion analyzes the facts as suggested above, they may be understood, with the help of the teacher case, as presenting a situation of a plaintiff without standing, rather than a situation of no jurisdiction. The discretion of the board of control like that of the school board is final, not because the judges are overawed by official status, but because the duly constituted legislative authority has said so.²³

The two remaining cases to be examined involved efforts to contest administrative activity in court pursuant to the Administrative Procedure Act.²⁴ In one, *Fortner v. Thomas*,²⁵ the plaintiff failed; in the other, *Burger Brewing Co. v. Liquor Commission*,²⁶ the plaintiff succeeded. Both cases involve the same industry, intoxicating beverages, but it might appear that brewers are more protected from official discretion than barkeepers, just as brewers appear to be more protected than public works bidders. First, the barkeeper, who must have a permit from the liquor department. He came to court to complain about a new regulation that he said affected him by reducing the freedom to manage his business that the liquor permit had previously allowed. The supreme court held that there is nothing justiciable about such a complaint and that the statute providing judicial review of state agencies and officers is ineffectual to give the complaint vigor: here there was no hearing, and jurisdiction could not be exercised.²⁷

The review statute in very broad terms invites the permit holder to the Common Pleas Court of Franklin County specifically in rule-making cases, yet justiciability was absent. It would be puzzling if the legal system keeps the barkeeper and the bidder out of court, but lets the cor-

Serv. Org. v. Camp, 397 U.S. 150, 153 (1970), in which the Court sets forth its requirement that the "interest sought to be protected by the complainant [must] arguably [be] within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." The interest to be protected need not be economic, *id.* at 154; however even if the plaintiff is functioning as a private attorney general, an injury to him is required, *Sierra Club v. Morton*, 405 U.S. 727 (1972).

²³ The court in *DeLong* is explicit upon this point, but its opinion in *Kelley* does not speak to the finality of the board's jurisdiction as such in determining the lowest responsible bidder.

²⁴ OHIO REV. CODE ANN. §§ 119.01-119.13 (Page 1968). For text of the judicial review provision, § 119.11, see note 4 *supra*.

²⁵ 22 Ohio St. 2d 13, 257 N.E.2d 371 (1970).

²⁶ 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973).

²⁷ 22 Ohio St. 2d at 19-20, 257 N.E.2d at 375.

porate brewing enterprise in without a better reason than that the former are unimportant individuals. Indeed the court does not say that one class constitutes a greater menace to the public interest or is more deserving of the court's protection. Rather the court's reason for keeping the barkeeper out lies in the meaning of the constitutional term "proceedings." However an alternative holding on standing could have been undertaken, one which would parallel the second branch of the *DeLong* opinion and which would be more consistent with the probable facts: barkeepers can have standing, but they must consult their counsellors instead of Franklin County common pleas about abstract questions concerning what their permit entitles them to do.

It does seem that the barkeeper may have made out no more than an appeal for an advisory opinion—it could be that he was seeking to have the court read the regulation, see whether on its face it diminished his scope under his permit, and if it did, then see whether such diminution would be unreasonable or unlawful.²⁸ As in *DeLong*, there seems to have been no issue of constitutionality in the distribution of the rule-making power between the liquor department and the legislature and no issue of infringement of a specific constitutional right of the permit-holder, for example, to work for the Democratic Party. Yet here, unlike the teacher and more like the bidder, the barkeeper did not get the court to read the regulation—at least the opinion of the court does not so much as hint at the contents of the regulation.

²⁸ The first paragraph of the syllabus in *Fortner* states that art. IV, § 4(B), of the Ohio constitution "contemplates quasi-judicial proceedings only." 22 Ohio St. 2d 13, 257 N.E.2d 371-72 (1970); see *id.* at 22, 257 N.E.2d at 376 (concurring opinion of Mr. Justice Duncan, expressing the belief that § 119.11 is unconstitutional "insofar as judicial review of quasi-legislative rules is involved"). The second, expressly approving *Zangerle v. Evatt*, 139 Ohio St. 563, 41 N.E.2d 369 (1942), states, "Courts will not aid in making or revising rules of administrative officers, boards or commissions, being confined to deciding whether such rules are reasonable and lawful as applied to the facts of a particular justiciable case." *Id.*, 257 N.E.2d at 372 (emphasis added). The facts of a particular justiciable case may, however, arise and be shown in court without a prior quasi-judicial proceeding, contrary to the conclusion of the first syllabus paragraph.

Both the majority and concurring opinions in *Fortner* imply that the procedure followed in making the rule did not involve the taking of testimony or the restriction of decision-making to a trial record, although what procedure was followed does not appear. Instead the opinions seem to be predicated upon the facts that the decision was embodied in a rule and that the plaintiff had no standing under § 119.12 of the Administrative Procedure Act, which provides that a party adversely affected may appeal to the Court of Common Pleas of Franklin County any "adjudication denying the issuance or renewal of a license . . . or revoking or suspending a license . . ."

The majority opinion characterized the proposed use of the Administrative Procedure Act as "challenging the lawfulness of an administrative regulation in a vacuum." *Id.* at 17, 257 N.E.2d at 373. If carried out, such use would produce the sterile exercise of laying the regulation beside the authorizing statute for comparison in the absence of facts showing that the plaintiff was aggrieved by the regulation. However, the holding seems to preclude showing such facts, either as presented in the proceedings leading to the adoption of the rule or arising upon its promulgation and shown by evidence in court.

As indicated above, the Burger Brewing Co. got hold of the brass ring. The declaratory judgment statute²⁹ was held to afford the plaintiff review of a liquor control commission regulation on its face, although the administrative review statute was held inapplicable.³⁰ Burger was challenging a regulation that diminished the discretion of the brewer in pricing its product, and there was not doubt that such a diminution would occur. There was need for legal advice, preferably from the highest and most binding source, although it remains shrouded in doubt whether the barkeeper was not as necessitous of advice in proportion to his financial scale. Neither the brewer nor the barkeeper had been directly subjected to the application of the rule; however Burger was able to adduce evidence of the cost of compliance, although it is not clear whether a person holding a permit like Fortner's could sufficiently quantify his detriment in anticipation of enforcement of the rule. Note that in *Fortner* the court considered that the question was presented in a "vacuum," whereas in *Burger* it did not. Despite these differences and with respect, it is submitted that the *Burger* opinion would be clearer had it not attempted to distinguish *Fortner* and had forthrightly overruled it.³¹

There are two dimensions of justiciability which must be considered here. The first is ripeness, which requires that the controversy be real and immediate so that the facts and issues are in a context suitable for judicial resolution. In none of the four cases is there indication that the administrative rule being challenged was based upon a trial hearing at which the party now claiming to be aggrieved had a right to appear and enter evidence. Although the opinion in *Burger* makes elliptical reference to hearings before the liquor commission,³² there is no indication that the commission relied upon them in formulating its rule, nor was any issue raised concerning the relationship of the hearings to the rule. Thus the state and local agencies appear to have proceeded after the manner of the legislature, which need not hold hearings and which, if it does, is not restricted to the record thereby developed in making its decision. Even with no semblance of a hearing ripeness was clearly satisfied in the teacher and bidder cases, involving review under the local

²⁹ OHIO REV. CODE ANN. § 2721.03 (Page supp. 1973), which provides:

Any person . . . whose rights, status, or other legal relations are affected by a . . . rule as defined in section 119.01 of the Revised Code [or] municipal ordinance . . . may have determined any question of construction or validity arising under such . . . rule [or] ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder.

³⁰ *Burger Brewing Co. v. Liquor Comm'n*, 34 Ohio St. 2d 93, 96, 100, 296 N.E.2d 261, 263, 266 (1973).

³¹ If the result in *Fortner* was correct, the reasoning seems unadequate to explain it.

³² 34 Ohio St. 2d at 97-98, 296 N.E.2d at 264-65.

administration statute. In them no further exercise of administrative discretion, prosecutorial or otherwise, would make the facts more certain or the evaluation of the aggrieved party's asserted interest more careful, or would render the controversy moot. The teacher had lost her job; the bidder, the award. On the other hand, in both liquor commission cases there were no "proceedings" within the meaning of the constitutional provision about common pleas jurisdiction, and, in both, further exercise of administrative discretion in application of the rule was possible. Thus the claim of the regulated party could be rendered moot either by failure to apply the rule to him or by a resolution favorable to him in a licensing hearing, and in any event the factual issues to be presented to the court could be further refined in the licensing hearing. The brewer, nevertheless, obtained remand for further proceedings. Under the declaratory judgment statute, the issues were held ready for judicial resolution because "hearings were held and briefs were submitted before the commission drafted the regulation in its present form."³³ As stated above, the court does not address the question whether the decision embodied in the regulation was at large, like that of the legislature, or whether it was based upon the hearings, nor does it label the procedure as "*quasi-judicial*," which constitutional doctrine seems to require. But the "vacuum" has disappeared because "the regulation itself essentially involves legal questions."³⁴

Also, the parties were adverse:

Since the plaintiffs are convinced that the regulation is invalid, they are placed in a perplexing dilemma: Either change their customary pricing and marketing procedures in order to conform with the regulation or challenge the regulation by disobedience and face severe sanctions. . . . It was to lift people from the horns of such a dilemma that the Declaratory Judgement Act was enacted.³⁵

Thus the plaintiffs were "presently subjected to the application" of the rule.³⁶

³³ *Id.* at 99, 296 N.E.2d at 266.

³⁴ *Id.* at 98, 296 N.E.2d at 265.

³⁵ *Id.* at 99, 296 N.E.2d at 265.

³⁶ *Id.* at 100, 296 N.E.2d at 266. The felicitous expression of Mr. Justice Harlan, "pre-enforcement suit," and the context in which it arose merit consideration at this point. The term was used in a case in which the administrative resolution was final and the attack presented the purely legal issue of ultra vires. Justice Harlan determined that the regulation merely served notice that the commissioner might take steps under it and that the regulated parties need do nothing as insurance against violating it should the regulation turn out to have been intra vires. Judicial review was rejected. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-66 (1967). Justice Harlan also wrote for the Court in two companion cases which held the rules reviewable, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967). The latter case was distinguished by Justice Har-

The existence of some kind of pre-determination hearing, apparently without regard to its impact on the rule that is made, plus the presence of a dilemma, albeit one involving legal questions only, may become the foundation for arguing that rule-making is "quasi-judicial" and that the requisite ripeness for justiciability is established to qualify within the jurisdiction of the court of common pleas. If so, the constitutional meaning of "proceedings" is wider than heretofore indicated.

The other element of justiciability to be considered is standing, which requires that an interest of the plaintiff be detrimentally affected by the challenged rule. If the value of the interest is so low that administrative discretion constitutes its metes and bounds, like the discretion of a donor, standing may be lacking. In the absence of detriment to a substantial interest, there is no genuine plaintiff to make the adversary system work; the issue is feigned or abstract, perhaps congenial to the classroom, but wasteful if used to attract judicial resources.

Only in the teacher case has the court directly confronted the question of standing, by its holding that the discretion of the board was final—apparently the court in *DeLong* considered the value of continued employment substantial enough to reach the merits of the claim. By contrast the court emphasized in both the barkeeper and the bidder cases that there had been no adjudicative procedure before the administrative body. Thus the supreme court avoided questions of scope of review and of finality of administrative discretion by concentrating upon the supposed jurisdiction of the court.

The two efforts of the General Assembly to assure judicial surveillance of administrative activity pale by contrast with its provision for the remedy known as the declaratory judgment. The apparent conclusion to be drawn is that the remedies of the court of common pleas determine its jurisdiction. However, it will be argued in the following lines that the second branch of the opinion in *DeLong*, finality of administrative decision, should also lead to the conclusion that the constitutional meaning of "proceedings" is not as narrow as heretofore indicated, and that while the remedy sought by a plaintiff may indeed raise questions of ripeness and standing, the label affixed to the remedy sought should not be regarded as controlling the jurisdiction of a court of general jurisdiction.

lan's opinion in the other *Toilet Goods* case as showing immediate impact of administrative action and as involving horrendous failure-to-comply sanctions: seizure of goods, adverse publicity, and possible criminal liability. *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164-65 (1967). In Ohio the three cases other than *Burger* suggest that there is no such concept as pre-enforcement suit, unless provision has been made for adjudication by quasi-judicial procedure.

Professional habits die hard. Over a century ago Ohio took a radical step away from common law pleading and assured plaintiffs that they could get into court without having to select among forms of action.³⁷ But, as F. W. Maitland has aptly stated, "The forms of action we have buried, but they still rule us from their graves."³⁸ Susan DeLong, the teacher, suffered no harm from the professional atherosclerosis that has produced a sequence of no-jurisdiction decisions. She obtained a judgment that her claim involved no legally protected interest. But the no-jurisdiction holdings in the barkeeper and bidder cases appear to ignore the principles that form shall not be exalted over substance and that the hapless plaintiff is not to suffer simply because his advocate chooses the wrong label. Equality before the law is ill-served by this type of technicality.

Suit under either of the administrative review statutes poses a threat that the supreme court will hold that the trial court lacked jurisdiction. Yet the language of the statutes speaks to equality of all aggrieved parties. The Administrative Procedure Act was held to deny jurisdiction in *Fortner*, and the local administration statute, in *Kelley*. On the other hand, the local statute did not prevent the court in *DeLong* from reaching the standing question (and effectively the merits), and in *Burger* the order of the court is not couched in terms of lack of jurisdiction. *Burger* states:

Therefore, the judgment of the Court of Appeals, determining that a declaratory judgment action was not an available remedy, is reversed; and, as to such issue, the cause is remanded to the Court of Appeals for further proceedings in accordance with this opinion.³⁹

Ripeness and standing may obtain even in judicial review of a rule, as shown by *Burger*. The significance of this conclusion is that the constitutional scope of "proceedings" subject to review in the court of common pleas is greater than previously indicated in *Fortner* and *Kelley*. And

³⁷ "The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place, there shall be, hereafter, but one form of action, which shall be called a civil action." OHIO GEN. CODE § 11238 (1938). The first application of this statute to review of administrative action before the supreme court may have been *Chinn v. Trustees*, 32 Ohio St. 236 (1877), a mandamus to obtain a veteran's bounty from the township. The court held the suit to be neither an action at law nor a suit in equity, and not a civil action under the code. The mandamus jurisdiction of the supreme court, however, seems to be jurisdiction of a veritable civil action. *State ex rel. Cope v. Cooper*, 121 Ohio St. 519, 169 N.E. 701 (1930). Subsequently mandamus in common pleas was likewise held a civil action. *State ex rel. Wilson v. Preston*, 173 Ohio St. 203, 181 N.E.2d 31 (1962) (a proceeding to compel the director of highways to give a lessee relief in connection with use of his land to develop the Millcreek Expressway in Cincinnati).

³⁸ F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1936).

³⁹ 34 Ohio St. 2d 93, 100, 296 N.E.2d 261, 266 (1973).

if this is so, then in those cases the court had jurisdiction to reach the questions of ripeness and standing, respectively. Finally in *DeLong* the court did confront justiciability. It is submitted that the result in *Burger* and the second branch of the decision in *DeLong* indicate that the court is abandoning its fixation on "quasi-judicial proceedings" and is moving toward a more appropriate emphasis upon ripeness and standing.

Two conclusions may be offered, based upon the court's somewhat muddled treatment of the 1968 constitutional amendment with respect to the jurisdiction of the court of common pleas. First, suppose the General Assembly values an interest highly enough to require the administrative body to make its determination on the basis of a trial hearing. In that case, if the regulated party seeks judicial review to contest a determination on the ground that no hearing was provided, he is assailing the lack of a procedurally supportable factual basis for the decision. Such a plaintiff would have standing. Second, suppose the determination takes the form of an order promulgating, amending, or rescinding a rule, and that the determination was based upon a trial hearing. A person interested in the rule and actually a party to the administrative hearing is not assured of instant review. He may be required to wait until the rule is applied individually to him, unless somehow he can demonstrate that its mere promulgation, under all the circumstances, so injures him that he should be able instantly to contest its validity on its face.

If these propositions are sound, the more recent formulation of the court in *Burger* relates not to the jurisdiction of the subject matter in any exact sense, but rather to jurisdiction to proceed to a remedy, *i.e.*, declaratory judgment as contrasted with something called "review." Nevertheless, until the court gets it all together a little better, counsel advising would-be plaintiffs will do well to consider whether it can be shown that the client had a right to an administrative determination based upon a trial hearing. If it can be demonstrated that such a requirement was violated, even the Administrative Procedure Act, contrary to the *Fortner* precedent, ought not preclude invalidation of a rule so made. If a trial hearing is not required, it is desirable for plaintiff to concentrate upon pleading and proving ripeness and standing, and insofar as possible to avoid invoking the two administrative review statutes.

This confusing state of affairs, in which rights are imperiled by incautious reference to remedial statutes, would be rendered more certain if the court would formally abjure the approach of *Fortner* and *Kelley*, in which jurisdiction is made dependent upon whether or not the proceeding was quasi-judicial, and would formally recognize that jurisdiction over all proceedings has been conferred and that its only concerns are ripeness

and standing. The scope of administrative review does not determine jurisdiction of the subject matter. Rather review has to do with "jurisdiction" (if at all) in respect of jurisdiction of the judicial remedy. Thus, nothing in the constitutional term "proceedings" should preclude review of administrative determinations that are unreasonable or otherwise not in accordance with law. Neither should anything in the constitution preclude the General Assembly from endowing courts with remedies by way of overlapping statutes nor should anything in the constitution serve as a basis for an argument that declaratory judgment is exclusive of "review." The armament of a court of general jurisdiction is plenary. It is not required to search a catalog for a jurisdictional caption.

According to Ohio Rule of Civil Procedure 2, which specifies that there is "only one form of action, . . . a civil action,"⁴⁰ an aggrieved party is entitled to invoke the jurisdiction of the court if he can state a claim for relief. In a court of general jurisdiction it should make no difference whether the claim is couched in terms of "review," under either of the local administration or state agency statutes, or in terms of injunctive, mandamus,⁴¹ declaratory or other remedy. However neither the declaratory judgment act nor the administrative review statutes purport to apply to nonjusticiable matters. Thus, if the statement of the claim indicates an absence of standing, which might occur when the legislature has constitutionally made the administrative determination "final" or when the interest to be protected is that of a non-party, the remedy specified in the complaint, whatever its name or form, cannot be granted. Likewise, if it should appear that the claim is not ripe for judicial determination, which might occur when further administrative relief must be exhausted or when further prosecutorial action is required before the interest is infringed, there can be no judicial relief. In either case, though, the aggrieved party is still entitled to a judgment of the court stating that his claim is nonjusticiable.⁴²

The local administration review statute does not extend to rule-making.⁴³ It is confined to orders which affect "the rights, duties, privileges, benefits, or legal relationships of a specified person," and even as to them excludes "any order issued preliminary to or as the result of a criminal proceeding."⁴⁴ Because rights are not subject to discretionary treatment,

⁴⁰ This rule carries forward OHIO GEN. CODE § 11238 (1938). For the text, see note 37 *supra*.

⁴¹ State *ex rel.* Selected Properties, Inc. v. Gottfried, 163 Ohio St. 469, 127 N.E.2d 371 (1955) (ordinance lacking in standards, variance permits should issue).

⁴² This was the result in Zangerle v. Evatt, 139 Ohio St. 563, 41 N.E.2d 369 (1942).

⁴³ Tuber v. Perkins, 6 Ohio St. 2d 155, 216 N.E.2d 877 (1966).

⁴⁴ OHIO REV. CODE ANN. § 2506.01 (Page supp. 1972).

there could be little question that issues involving their adjudication would be justiciable; a party endowed with rights is "aggrieved" from the moment any administrative action infringes them. As to privileges and benefits, questions of standing do arise, and the court cannot grant "review" if the matter is adjudged not to be justiciable. Nevertheless even in this latter event the jurisdiction of the court would have been exercised; the matter would be *res judicata*, binding the plaintiff not again to invoke the jurisdiction by the same claim for relief. However even if he did, the second judgment would properly be based upon *res judicata* rather than lack of jurisdiction.

If it were contended that the local administration statute is unconstitutional because it extends to cases in which the plaintiff lacks standing, the argument would be perverse. The plaintiff in such circumstances is merely seeking to obtain application of the statute in an unconstitutional manner. Similarly the argument that the statute providing for review of rule-making can never have constitutional application seems to be a premature prediction and essentially *obiter dicta* in *Fortner*, whatever the precedent value of *Burger*.⁴⁵ The premise of *Fortner*, that rules are not subject to judicial review in a vacuum, is, however, a useful guide to justiciability in cases of review of both rules and statutes. A careful elaboration of review situations which do not present such a vacuum remains for further adjudication.

Whether the plaintiff complains of state or local administrative activity, he must have a justiciable claim, but his specification of the remedy sought bears no necessary relationship to jurisdiction. The declaratory judgment act no more enlarges the meaning of the constitutional ambit of "powers of review of proceedings of administrative officers"⁴⁶ than does the Administrative Procedure Act, or the local administration statute. All three enactments serve to implement parts of the constitutional grant of jurisdiction. They are not mutually exclusive, but rather should be construed as cumulative and, in cases where they so apply, overlapping remedies.

⁴⁵ If the legislature has required that the state agency or officer grant an opportunity for a trial hearing upon the basis of which a rule is to be formulated, use of the label "quasi-legislative" is inappropriate. A plaintiff entitled by either the constitution or statute to such a hearing is aggrieved when hearing is denied. He is entitled to the review specified in the state agency statute, on the ground that the agency or officer had violated the law investing him with the right to a hearing. Similarly, a plaintiff aggrieved is one who has an immediate right to have the rule set aside because of legal error or abuse of discretion so affecting the plaintiff as to infringe an interest then protected by law and to give the plaintiff a basis for a claim for relief. However, mere legal uncertainty does not ordinarily attract the jurisdiction of a court nor does the mere imposition by the legislature of the cost of litigation.

⁴⁶ OHIO CONST., art. IV, § 4(B).