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Judicial Review of Conservation Rules in Wisconsin

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JUDICIAL REVIEW OF CONSERVATION RULES IN WISCONSIN

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GENERAL METHODS OF OBTAINING REVIEW

One of the most complicated aspects of the administrative process insofar as administrative rules are concerned relates to the scope and methods of judicial review. The subject of judicial review with all of its many facets is too complex to submit to a detailed discussion regarding its operation on administrative rules generally in Wisconsin in this study.[1] It may be said, however, that the adoption of the state's first administrative procedure act in 1943 appears to have incorporated the legislative intent to abolish the multiplicity of statutes authorizing a variety of review procedures for the several state agencies. In place of the diversity existing prior to 1943—there were 74 separate statutes establishing procedures for judicial review—the first administrative procedure act sought to establish a uniform procedure for judicial review of administrative decisions in Wisconsin.[2]

There are a variety of possibilities which judicial proceedings to review an administrative decison may take. First, in actions to enforce a rule the validity of the rule may be determined by the courts.[3] A slight variation on this point are statutory injunction proceedings which are also available for the enforcement of many state agencies' rules.[4] The validity of rules clearly can be attacked in such proceedings. Moreover, the validity of a rule may be attacked in actions between private parties in the event the defendant raises and seeks to have determined the validity of a rule at issue in the case.[5] Another method by which

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[1] The role of judicial review as it applies to each of 46 Wisconsin agencies is summarized in: WISCONSIN LEGISLATIVE COUNCIL, INTERIM REPORT ON ADMINISTRATIVE RULE MAKING, No. I and II; LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE RULE MAKING, LIMITATIONS ON ADMINISTRATIVE DISCRETION, May 27, 1954; WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, Ch. IV.

[2] For a discussion of this point see: R. Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 WIS. L. REV. 214 (1944). The Wisconsin Supreme Court quotes Mr. Hoyt's conclusions with approval in Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514 (1952).

[3] See: State v. Sorenson, 218 Wis. 295, 260 N.W. 662 (1935).

[4] See: WISCONSIN LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE RULE MAKING, LIMITATIONS ON ADMINISTRATIVE DISCRETION, May 27, 1954, p.4.

[5] See for an example of such proceedings: Verbeten v. Huettl, 253 Wis. 510, 34 N.W.2d 803 (1948), where the issue of negligence turned on the fact of compliance or non-compliance with a school bus regulation issued jointly by the

the validity of a rule may be attacked is through action to restrain enforcement of the rule. While this method has been used successfully in the past,[6] the Wisconsin legislative council committee on administrative rule making found it difficult to determine whether this type of proceeding has been superceded by the declaratory judgment procedures outlined in WIS. STATS. (1953) Section 227.05.[7]

One of the most far reaching methods by which the validity of administrative rules can be reviewed by the courts is outlined in WIS. STATS. (1953) Sections 227.16 to 228.21. In certain situations the validity of an administrative decision relating to a particular person sometimes depends on the validity of an underlying rule. It is essential, in such a case, to determine the validity of the rule prior to the determination of the validity of the particular decision. Procedures by which a rule may be reviewed in such a situation are outlined in the statutory sections just noted. In at least one case,[8] the Wisconsin Supreme Court assumed without discussing the question that the validity of an underlying rule could be determined in the same proceeding in which the validity of an administrative decision is tested.

Traditionally, the method of obtaining the type of review just mentioned was by one of the so-called "common law extraordinary writs" —certiorari, mandamus, prohibition, habeas corpus and *quo warranto*.[9] Though common law writs are preserved by the Wisconsin Constitution[10] and thus cannot be abolished by legislation, the staff of the legislative council committee on administrative rule making concluded that,

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Motor Vehicle Department and the Department of Public Instruction. In this case, however, the validity of the rule was not attacked.
190, 256 N.W. 922 (1933).

See also: Corsvet v. Bank of Deerfield, 220 Wis. 209, 263 N.W. 687 (1936), where in an action against the bank on certificates of deposit, a depositor attacked a stabilization agreement which had been approved by the banking commission and which affected all despositors.

[6] See: Modern System Dentists v. State Board of Dental Examiners, 216 Wis. 190, 256 N.W. 922 (1933).

[7] Compare: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p. 120, and WISCONSIN LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE RULE MAKING, LIMITATIONS ON ADMINISTRATIVE DISCRETION IN RULE MAKING, May 1954, p. 3.

[8] Gray Well Drilling Co. v. Board of Health, 263 Wis. 417, 58 N.W.2d 64 (1953).

[9] Many writers have criticized the use of these remedies because the decision in a case frequently turns on the correctness of the remedy pursued rather than on the merits of the case. See for example: K. C. Davis, *Administrative Law*, St. Paul, 1951, pp. 718-720; Larson, *Administrative Regulations and the Extraordinary Writs in the State of Washington*, 20 WASH. L. REV. 768 (1945); McGoveney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies*, 15 So. CALIF. L. REV. 775 (1942); WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p.119; G. R. Haas, *The Use of Mandamus to Review Administrative Actions in New York*, 4 BUFFALO L. REV. 334 (1955); Note, *Judicial Review of Administrative Action in Florida—Certiorari*, 2 MIAMI L. Q. 181 (1947); Note, *Judicial Review of Administrative Actions in Florida—Quo Warranto*, 2 MIAMI L. Q. 229 (1948).

[10] WIS. CONST. Art. VII, §§3 & 8.

> ". . . there is little doubt that the procedures prescribed by Chapter 227 for review of administrative decisions (as distinguished from that prescribed for review of rules) was intended to be the exclusive method of review."[11]

The procedures spelled out in Sections 227.16 to 227.21 may be summarized briefly. Section 227.16 defines the type of person who is entitled to seek judicial review and goes on to explain the form and the method of serving a petition instituting review proceedings. The agency and all parties to the proceedings have the right to participate in the proceedings for review. The Circuit Court of Dane County which has jurisdiction in such cases (unless other statutes specify a different place of review) is granted the discretionary power to permit other parties to intervene. Section 227.17 provides that the institution of proceedings for review shall not stay enforcement of the agency decision, but permits the reviewing court to order a stay upon such terms as it deems proper. Section 227.18 outlines the method for handling the record of the proceedings and authorizes the court to permit subsequent corrections or additions in the record. Section 227.19 explains the methodology for presenting additional evidence prior to the trial, sets a minimum time before the trial may be held and outlines demurrer procedures and procedures for amending the petition.

Of special interest is Section 227.20 which spells out the scope of review. It provides that the review is to be conducted by the court without a jury and is to be confined to the record except for certain cases of alleged irregularities in procedures before the agency. The court may affirm, reverse or modify the agency's decision if the "substantial rights of the appellant have been prejudiced" as a result of administrative findings or conclusions which are: (1) contrary to constitutional rights and privileges (2) *ultra vires* (3) made or promulgated upon unlawful procedure (4) arbitrary or capricious (5) unsupported by substantial evidence in the entire record. Section 227.21 permits any party to appeal the judgment of the circuit court to the Wisconsin Supreme Court and lists the procedures to be followed. Finally, Section 227.22 merely excepts certain actions of the board of tax appeals and the department of taxation from the procedures outlined above. The procedures just discussed have not been altered and were not intended to be altered by the 1955 Administrative Procedure Act.[12]

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[11] See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p.119. See also: Hoyt, *op. cit.* Compare, however, these views with those found in: WISCONSIN LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE RULE MAKING, LIMITATIONS ON ADMINISTRATIVE DISCRETION, May 1954, p.2.

[12] This was also the conclusion of the staff of the legislative council committee on administrative rule making when this writer discussed the matter with them. For a discussion of the problem of substantial evidence see: Note, *The Status*

DECLARATORY JUDGMENTS

Provisions Prior to 1955. Of primary concern in a discussion of judicial review of administrative rules are the declaratory judgment proceedings outlined in WIS. STATS. (1953) 227.05.[13] This may be considered the last and probably the major method (theoretically at least) by which the validity of rules may be reviewed by courts. Proponents of declaratory judgment proceedings in administrative law have emphasized the speed, economy and efficiency of such procedures. Opponents, on the other hand, are concerned about the fact that the provisions of the Model Administrative Procedure Act on this subject (which were adopted in WIS. STATS. (1953) Section 227.05) allow declaratory judgments to be rendered without prior resort to administrative remedies. Such practices, it was thought, might result in moot or hypothetical questions being decided under conditions disadvantageous to the agency.[14] However, after the Wisconsin legislative council committee on administrative rule making had concluded its study of Wisconsin agencies—which included an investigation of the effects of judicial review procedures—the committee concluded that there was little available information as to how the declaratory judgment provision has worked in Wisconsin.[15] The only case specifically involving this provision to reach the state supreme court was dismissed when the court found that the petitioners did not have any standing to challenge the rule in question.[16]

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of Substantial Evidence, 3 INTRA L. REV. 43 (1954); M. B. Parsons, *Substantial Evidence Rule in Florida,* 6 U. OF FLA. L. REV. 481 (1953); *Ultra vires* action is discussed in: S. A. DeSmith, LIMITS OF JUDICIAL REVIEW: STATUTORY DISCRETION AND THE DOCTRINE OF ULTRA VIRES, MODERN L. REV. 306 (1948). See also: Note, *Noncompliance with the APA as Reversible Error,* 6 STANFORD L. REV. 693 (1954).

[13] The Conference of the Commissioners on Uniform State Laws in urging the inclusion of such a provision in the Model Administrative Procedure Act stated that, "Certain impediments including the judicial requirement of an actual case or controversy and the doctrine of prior resort to administrative remedies have developed to prevent [the Uniform Declaratory Act] from having the general utility that is to be desired." See: Handbook of the National Conference of Commissioners on Uniform State Laws, 1943, pp. 235-236.

[14] For a summary of the arguments for and against the provisions of the declaratory judgment act as adopted in Wisconsin see: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, pp. 116-117.
For a general discussion of the role of declaratory judgments in administrative law see: Davis, *op. cit.* pp. 729-732; G. Borchard, DECLARATORY JUDGMENTS IN ADMINISTRATIVE LAW, 11 N.Y.U. L.Q. REV. 139 (1933); Note, *Scope of Judicial Review of Administrative Action,* 28 PHIL. L. J. 572 (1953); Note, *Development in the Law—Declaratory Judgments,* 62 HARV. L. REV. 787 (1949); U. A. Lavery, DECLARATORY JUDGMENTS IN ADMINISTRATIVE LAW, 35 CH. B. REC. 295 (1954); G. J. Borrie, ADVANTAGES OF THE DECLARATORY JUDGMENT IN ADMINISTRATIVE LAW, 18 MODERN L. REV. 138 (1955).

[15] See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p.17. It was thought, however, that some confusion appears to have resulted in practice because §227.05 speaks in terms of a "petition" rather than an "action" for a declaratory judgment.

[16] Hecker v. Gunderson, 245 Wis. 655, 15 N.W.2d 788 (1944).

The provision of the statutes outlining declaratory judgment proceedings on rules prior to 1955 may be briefly summarized. This section[17] provided that the validity of any rule could be determined by petition for declaratory judgment addressed to the Dane County Circuit Court except where the statutes specifically provided otherwise. The court was authorized to render a declaratory judgment only if it appeared from the petition or the evidence that the rule or its threatened application interfered with or threatened to interfere with the legal rights and privileges of the petitioner. A declaratory judgment could be rendered whether or not the petitioner had first requested the agency to pass upon the validity of the questioned rule. The section then pointed out that in rendering judgment, the court should give effect to any pertinent:

> "(a) constitutional limitations upon the powers of the agency; (b) statutory limits upon the authority of the agency; (c) if the rule in question is an interpretative rule, the limits of correct interpretation; and (d) statutory requirements concerning rule making procedures."

Finally, it provided that when a decision concerning the validity of a rule required a decision upon an issue of fact concerning the applicability of the rule to the petitioner, after deciding the pertinent question, the court must refer the case to the agency for a determination of the fact issue under the section of the statutes dealing with declaratory rulings.[18] Thereafter, the court's review of the agency determination is to be had in a manner prescribed for declaratory rulings.

Problems Caused by the Original Provisions. One problem that confronted the Wisconsin legislative council rule making committee regarding declaratory judgment proceedings as a means of judicial review of rules was whether the proceedings just outlined were intended to be the exclusive method of judicial review of rules.[19] The statute is ambiguous in this respect. The state supreme court seems to have developed a general doctrine to the effect that when a statutory procedure for appeal from administrative action is prescribed, that procedure must be followed to the exclusion of other remedies.[20] This doctrine, however, appears to have been discussed primarily in relation with review of administrative decisions rather than specifically to rules.

[17] WIS. STATS. (1953) §227.05.

[18] Declaratory ruling procedures are outlined in WIS. STATS. (1953) §227.06.

[19] WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, pp. 117-118; WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part I, December 1954, pp. 7-8.

[20] See: Munninghoff v. Conservation Commission, 255 Wis. 252, 38 N.W.2d 712 (1948); Perkins v. Peacock, 263 Wis. 644, 58 N.W.2d 536 (1953); City of Superior v. Committee on Water Pollution, 263 Wis. 23, 56 N.W.2d 501 (1953); State *ex rel.* Russel v. Board of Appeals of the Village of Prairie du Sac, 250 Wis. 394, 27 N.W.2d 378 (1947).

Moreover, there is some indication that the doctrine is not without exceptions. In *Perkins v. Peacock,* for example, a case involving the validity of an order by a county school committee consolidating school districts, the court said:[21]

> ". . . whether a statutory remedy of appeal is the exclusive remedy of an aggrieved party to review jurisdictional defect in procedure, or abuse of statutory power, depends upon legislative intent as construed by the courts, and whether such right of appeal is adequate to permit review of such matter . . .
> "Even in those cases wherein this court has construed a statutory right of appeal as being intended by the legislature to be the exclusive remedy for reviewing jurisdictional defects in procedure, there may be exceptional cases where such right of appeal would be inadequate for such purpose and certiorari might lie,—for example, where statutory notice was not given and the aggrieved party did not receive actual notice until the time for appeal had expired."

The legislative council committee on administrative rule making concluded after a study of the notes to the drafts of the Model Administrative Procedure Act (on which the Wisconsin provision is based) and of records of the Wisconsin legislature, that it is not clear whether or not the legislature intended the proceeding spelled out in WIS. STATS. (1953) Section 227.05 to be the exclusive method of obtaining judicial review of rules.[22] The committee, therefore, recommended a revision of that section to clarify the various forms of proceedings in which the validity of a rule may be reviewed.[23] The recommendation was incorporated in the newly adopted Administrative Procedure Act.[24]

Provisions of the Revised Procedure Act. The new section provides that with the exception of a few specified situations, the exclusive means of judicial review of the validity of a rule shall be a declaratory judgment action brought in the Circuit Court of Dane County. The agency whose rule is involved must be the party defendant in such cases. After outlining the procedures to be followed in delivering a summons in such an action, the new section repeats the provision of its predecessor which states that such a judgment shall be rendered only if the court determines that the rule or its theatened application interferes with legal rights and privileges of the plaintiff. Declaratory judgments under the new law may be rendered whether or not the plaintiff has first requested the agency to pass upon the validity of the

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[21] 263 Wis. at 658.
[22] WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p. 118.
[23] See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part I, pp. 7-8.
[24] WIS. LAWS 1955, c. 221, §227.05.

rule in question. The new section also changes the provision of the earlier law in cases where an issue of fact is raised concerning the applicability of a rule to a party[25] so that now the cases shall be referred by the court to the agency issuing the rule *before* rather than *after* the court has decided on the pertinent legal questions. Review of agency action, following the declaratory ruling is now specifically placed under the provisions of Section 227.20.

The new section, moreover, specifies that the validity of a rule may be determined in any of the following judicial proceedings:[26]

(a) Any civil proceeding by the state or any officer or agency thereof to enforce a statute or to recover thereunder, provided such proceeding is not based upon a matter as to which the opposing party is accorded an administrative review or a judicial review by other provisions of the statutes and such opposing party has failed to exercise such right to review so accorded;
(b) Criminal prosecutions;
(c) Proceedings or prosecutions for violation of county or municipal ordinances;
(d) Habeas corpus proceedings relating to criminal prosecutions;
(e) Proceedings under §§227.15 to 227.21 for review of decisions and orders of administrative agencies provided the validity of the rule involved was duly challenged in the proceeding before the agency in which the order or decision sought to be reviewed was made or entered.

Another portion of the new law[27] provides that in any judicial proceedings other than those relating to declaratory judgments just outlined, where the invalidity of a rule is material to the cause of action, the assertion of such invalidity must be set forth in the pleading of the party raising this issue. Within 30 days after the service of the pleading in which the invalidity of a rule is asserted, the party making the assertion must apply to the court for an order suspending the trial or such proceedings until after a determination of the validity of the rule at issue is made in an action for a declaratory judgment. The procedures to be followed in such declaratory judgment proceedings are next spelled out in detail. It is important to note, that the failure to set forth the invalidity of the rule in a pleading or to commence a declaratory judgment proceeding, "within a reasonable time" pursuant to such an order of the court shall preclude a party from asserting or maintaining that such a rule is invalid.

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[25] The new provision is also more far-reaching than the earlier one in regard to the situations encompassed. It states, "Whenever an issue of fact is raised concerning the applicability of a rule to a party *or affecting the validity or proper interpretation of a rule* . . . (Emphasis added to indicate the addition made by the new law). See: WIS. LAWS 1955, c. 221, §227.05(2).

[26] WIS. LAWS 1955, c. 221, §227.05(3).

[27] *Ibid.*, §227.05(4).

This section concludes with a provision noting that in any action under the section relating to review of rules, the court shall declare the rule invalid if it finds the rule violates constitutional provisions, is *ultra vires,* or was adopted without compliance with statutory rule making procedures.

It was the conclusion of the committee on administrative rule making of the legislative council that action for declaratory judgments in the Circuit Court of Dane County will be the primary method of review under the new law.[28] The new law, however, the committee pointed out, also makes clear that a rule may be reviewed in other proceedings if the validity of the rule is a material issue in that proceeding. The committee offered as an example of this type of proceeding the case of a person who is charged in a criminal action with violating a rule. Such a person clearly can contest the validity of the rule in that action the committee asserted.

Judicial Review and Conservation Rules

The general procedures regarding judicial review just outlined apply to actions of the Wisconsin conservation commission. One exception to these general procedures, however, is the statute which provides that rules affecting fish and game seasons are subject to review as provided in Chapter 227 except that if the rule affects only the county in which the appellant resides, the appeal shall be to the circuit court of such county.[29] It has been previously explained that normally agency rules are subject to review by the Dane County Circuit Court. While the term "order" in this section has been changed to the word "rule" (as is true in all statutes dealing with the conservation rule making process)the 1955 Administrative Procedure Act makes no change in the statute regarding rules dealing with fish and game seasons which affect only the county in which the appellant resides.[30]

Several facets of conservation rule making procedures have come under the scrutiny of the Wisconsin Supreme Court. It is rather surprising, however, considering the far-reaching nature of conservation rules that judicial review has not played a more important part than has been the case. Moreover, in several of the cases in which the state supreme court had an opportunity to decide important procedural quesions regarding various aspects of the conservation rule making process and closely related matters the court's opinions have done little to clear up the ambiguity in the statute law.

The Krenz Case. Certain provisions of the act creating the present conservation commission and delegating to it licensing authority

[28] Wisconsin Legislative Council, 1955 Report, Administrative Rule Making, Vol. II, Part I, December, 1954, p. 8.
[29] Wis. Stats. (1953) §29.174(8).
[30] See: Wis. Laws 1955, c. 221, §29.174(8).

and limited rule making powers[31] was reviewed by the supreme court the year following its enactment in *Krenz v. Nichols*.[32] Representatives of the conservation department note, and the lawyer's briefs in the case indicate that one of the key issues in the case was considered to be the validity of the legislature's delegating rule making and licensing powers to an administrative agency. The opinion of the court, however, makes relatively little of the delegation issue, although the authority of the commission to license and regulate private muskrat farms is clearly upheld.

In overruling the trial court's holding that the statute authorizing the commission to license and regulate private muskrat farms[33] was invalid the state supreme court enunciated a most significant rule regarding conservation regulation in Wisconsin. The State of Wisconsin, the court pointed out, holds title to the wild animals in trust for the people. No individual has any title to any such animal until he reduces it to lawful possession. As a trustee, the court explained, the state may conserve wildlife and regulate or prohibit its taking in any reasonable way it may deem necessary for the public welfare so long as it does not violate any organic law of the land.[34] The court then concluded that the section of the statutes authorizing the commission to license and regulate private muskrat farms was not contrary to any provision of either the state or the national constitutions. Since the statute was intended to conserve trust property, the court reasoned, it should be given a liberal construction to conserve its validity.[35]

While the court in the *Krenz* case did not give a detailed rationale of its attitudes specifically regarding the rule making authority of the commission, in a series of later cases the court uniformly upheld the rule making powers of the commission against the charge that it constituted an unconstitutional delegation of legislative authority. These cases also indicate the variety of legal techniques used to obtain judicial review of conservation commission rules.

The Sorenson Case. The leading case involving the rule making authority of the conservation commission is *State v. Sorenson*.[36] Here

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[31] See: WIS. LAWS 1927, c. 426.
[32] 197 Wis. 394, 222 N.W. 300 (1928).
[33] WIS. STATS. (1927) §29.575.
[34] 197 Wis. at 400.
[35] Similar reasons were advanced by the court two years later in upholding a law establishing fishing regulations on Lake Michigan against the charge that it violated the state's constitutional provision that local laws must encompass only one subject and that subject must appear in the title of the law. The court held that laws are not merely local within the meaning of the constitution when the subject thereof is such that the state itself has an interest therein as a proprietor or as a trustee or in its governmental capacity for the benefit or in the interests of the general public. See: Monka v. Conservation Commission, 202 Wis. 39 (1930).
[36] 218 Wis. 295, 260 N.W. 662 (1935).

the defendent was charged with violating a rule of the commission[37] establishing a bag limit on various species of fish taken from the Mississippi River where it forms a boundary of the State of Wisconsin. Using the arguments set forth by the United States Supreme Court in the *Panama Refining Company case*,[38] the defendant argued that this rule constituted an illegal delegation of legislative authority in that sufficient standards limiting the authority of the commission were not established. The court, however, after pointing out that the order resulted from an agreement reached at a joint conference with representatives of the conservation departments of Minnesota and Wisconsin, threw out the defendant's contention and listed the standards which limit the authority of the commission.

First, the court noted that the statute under which the rule was promulgated[39] restricted the commission to adopting rules affecting boundary waters as a result of joint action with officials of the other states involved. The second, and more general standard limiting the authority of the commission, the court explained, was to be found in WIS. STATS. (1933) Section 23.09. This section stated that the purpose of the conservation act which delegated wide rule making powers to the commission was for the "protection, development and use of fish and game in the state." These, the court felt, were sufficiently definite standards. Moreover, the court refused to be convinced that these rules were arbitrary, unlawful and unreasonable inasmuch as the joint action of both Wisconsin and Minnesota in adopting the same rule was aimed at establishing uniformity.

The Olson Case. Five years later the supreme court in *Olson v. Conservation Commission*[40] was again asked to rule on the validity of commission rules adopted under the same statute at issue in the *Sorenson* case. In the *Olson* case, however, a different technique was utilized to obtain judicial review of a commission rule, for it involved an action to restrain the commission from enforcing a rule[41] regulating the size of nets used by commercial fishermen in interstate waters. The case came to the supreme court on appeal from an action of the Dane County Circuit Court sustaining a demurrer of the commission.

The Wisconsin Supreme Court again pointed out that the legislature had provided sufficient standards when it delegated rule making authority to the commission in this area. Varying slightly from the words of the court in the *Sorenson* case, the court here stated that the

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[37] Rule No. M-4 (1935).
[38] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).
[39] WIS. STATS. (1933) §29.085.
[40] 235 Wis. 473, 293 N.W. 262 (1940).
[41] Rule No. F-405 (1940).

standard to which the authority of the commission rules must conform was, "to conserve the fish and game supply." Moreover, the court stated summarily, the commission rule was not unreasonable or unjust.

In answering a series of other contentions raised against the rule, the court held that a rule regulating net sizes is not class legislation inasmuch as it applied to all commercial fishermen. It was further contended that since the order applied to licensed commercial fishermen, and since the fishermen had been licensed prior to the adoption of the rule which reduced the size of nets previously in use, the rule constituted an impairment of a contract. (Under the new rule, nets which had been legally licensed before were made an illegal method of taking fish.) The court held, however, that a license is not a contract, and that the legislature or its delegated agent can alter or revoke such a license even though the fishermen had purchased the license and it had not expired before the adoption of new regulations affecting the licensee. The petitioner must have been aware of the fact that license provisions can be changed, the court believed.

The court also held without discussing the point that the commission rule did not deny equal protection of the laws. Furthermore, merely because the fisherman must abandon some equipment as a result of the new order does not mean he has been denied due process of law the court reasoned in answering another contention. Finally, in response to the argument that the rule violated WIS. STATS. (1939) Section 29.174(12) by changing penalties established by statutes, the court ruled that the petitioner had no standing to maintain that the commission had changed the penalty since the petitioner had not been charged with violation of this or any other commission rule.[42]

The Winkler Case. The other major case specifically involving the rule making authority of the conservation commission to come before the state supreme court involved a commission rule[43] making it unlawful for any person to carry or to have in possession any rifle other than a .22 caliber rimfire in specified deer country during the closed season on deer.[44] The defendant was charged with violating the order. The jury found that the defendant while guilty of the facts alleged did not intend to use the gun in an illegal fashion, whereupon

[42] The conclusion of the Wisconsin Supreme Court in both the *Sorenson* and the *Olson* cases were adopted by the federal District Court for the Eastern District of Wisconsin in a case with a similar fact situation involving the director of the Wisconsin conservation department. Here the court also held that even if Wisconsin conservation officials acted in an arbitrary and oppressive fashion in inspecting plaintiff's fishing craft on the Great Lakes, the federal District Court would not have jurisdiction over the controversy. See: LeClair v. Swift, 76 F.Supp. 729 (1948).

[43] Rule No. M-40 (Rev. 5) (1948).

[44] State v. Winkler, 255 Wis. 352, 38 N.W.2d 471 (1949).

the trial court held that the commission rule would not apply if no intent to hunt was established. Moreover, the trial court held that the order would be unreasonable if it was meant to apply where no intent to violate the closed season rule was established.

The Wisconsin Supreme Court in reversing noted that the validity of delegating legislative authority to the conservation commission had been upheld in the *Sorenson* case. It went on to hold that the rule in point here had been violated by the defendant's mere carrying of a prohibited gun under the circumstances without any intent to use the gun for hunting at the time in question. It is evident, the court said, that carrying or transporting of prohibited fire arms during the closed season evidently constitutes the most material or important element of the offense defined by the order. On the other hand, it was pointed out, the intent to hunt is not stated to be or to constitute an essential element of the offense defined by the order, nor is there any basis therein for deeming the absence of proof of such an intent a defense when a violation is charged. The trial court's finding that there was no intent, the Wisconsin Supreme Court concluded, was immaterial.[45]

The Munninghoff Case. One further case concerning the conservation commission must be noted, for while it does not specifically involve the rule making authority of the commission, it does cast some light on the Wisconsin Supreme Court's views regarding judicial review procedures set forth in Wisconsin's 1943 Administrative Procedure Act. The case involved the powers of the commission to issue private fur farm licenses and as such might normally be considered as an example of a "contested case" action within the meaning of WIS. STATS. (1953) Section 227.01(3) rather than a case involving rule making. It is also noteworthy as an example of a case in which the holding of the court struck down an administrative action in an area where the court has normally been most willing to permit wide leeway to the agency. As such, the decision of the court still causes consternation among various elements in the Wisconsin Conservation Department.

The fact situation in the *Munninghoff* case[46] as outlined by the supreme court is especially noteworthy. Munninghoff petitioned the commission for a license to operate a private muskrat farm on the backwaters of the Wisconsin River. Following its normal procedures, the commission formally voted on the question of whether such a license should be granted. A tabulation of the votes revealed that the

[45] For a recent attorney general's opinion upholding the constitutionality of the legislature's delegation of rule making powers to the commission as contained in WIS. STATS. (1951) §§23.09(7), 29.174(2), 29.174(9), see: 41 OPS. ATT'Y GEN. 256 (1952).

[46] Munninghoff v. Wisconsin Conservation Commission, 255 Wis. 252, 38 N.W.2d 712 (1948).

commission was equally divided 3 to 3 on the issue, whereupon the commissioners requested the department director to make the decision. The director ruled to refuse the license and the license was refused by the commission.

Petitioner then started review proceedings under Chapter 227 of the statutes—the Wisconsin Administrative Procedure Act—in the Circuit Court of Dane County. The commission demurred on the ground that the statutes governing the conservation commission do not provide for administrative review of a denial of a license. The demurrer, however, was overruled. The parties then stipulated that this action could be considered as one for mandamus under Chapter 293, or as an action for a declaratory judgment under Section 269.56 or as an administrative review, whichever ultimately might be determined to be proper.

The trial court held, however, that it was not obliged or permitted to be bound by the stipulation. The petition, Circuit Court Judge Alvin Reis flatly held, is under the Uniform Administrative Procedure Act, for where a statute provides the method for judicial review, as does Section 227.15 there is no other means available. Moreover, the court stated, there was no need for a declaratory judgment for the court was rendering an

> ". . . out-and-out judgment on the basis of the petition and that is that the director's order denying a license should be reserved on two grounds, at least, as they appear in Section 227.20."

These grounds were, the court noted, that the action was *ultra vires* and that it was unsupported by substantial evidence.

While the opinion of the Wisconsin Supreme Court in the *Munninghoff* case is a lengthy one, almost no space is devoted to a discussion of the important procedural problems of judicial review under the Administrative Procedure Act. The court held merely that a decision of the conservation commission denying an application for a muskrat farm license under Section 29.575 is subject to judicial review under WIS. STATS. (1947) Section 227.15. Inasmuch as the court made no attempt to present a rationale for this holding it might be assumed that the reasoning of the circuit court was adopted on this point. Because of the absence of discussion by the supreme court on the problem of judicial review, however, this case has been a source of some bewilderment to the conservation department counsel and to the representative of the attorney general's office assigned to the conservation commission. Their feeling appears to be that the application of the rule on this point must be restricted to the specific fact situation involved in the *Munninghoff* case.

The Grange Case. Before concluding a discussion of judicial re-

view of conservation rules it is necessary to take notice of *Grange v. Conservation Commission.*[47] This case, while never reaching the Supreme Court of Wisconsin, is noteworthy in that it raises a series of unique points regarding the commission's rule making procedures and methods of obtaining judicial review of its rules. Moveover, the pre-trial maneuvering is of particular interest.

Grange petitioned the court to utilize the authority granted it under Section 227.15 to reverse a rule[48] of the conservation commission establishing a controlled waterfowl hunting season on the Horicon marsh which is a federal wildlife refuge. The commission rule resulted from joint action with the federal authorities acting under provisions of the federal Migratory Bird Act.[49] Under this provision the Secretary of the Interior was authorized to open, up to 25 percent of any federal refuge, to hunting. The briefs in the case, however, indicate that a major concern of both parties was with procedural problems of rule making by the commission and the proper techniques to be used in obtaining judicial review of the commission's rules.

In the pre-trial action, assistant attorney general Roy Tulane, counsel for the commission, moved to dismiss the case if the petitioner insisted upon proceeding under Section 227.15 on the grounds that there was no statutory authority to use such proceedings for the review of an agency's rule as defined in Section 227.01(2) of the statutes. In the first instance, the attorney general felt that the case should be brought on a federal level under the federal Administrative Procedure Act, for if this procedure was not followed the petitioner would not be exhausting his administrative remedies. Secondly, however, counsel for the commission noted, even if it were conceded that the case might originate in a state court, action should be brought under the declaratory judgment provision of Chapter 227[50] rather than under Section 227.15.

The petitioner, in addition to seeking review of the commission order under Section 227.15, also moved that the conservation commission be "compelled to adopt rules for its own procedure, (and) pleadings before it, . . . as required by WIS. STATS. (1953) Section 227.08. This approach apparently resulted from the adverse interrogation of then-conservation director Ernest Swift in a pre-trial hearing before a court commissioner after Swift's replies indicated that the commission had not conformed to statutory requirements in adopting such rules.

In its Ruling on Motions, the court had some interesting observa-

[47] 93 Dane County Cir. Ct. 179 (1954).
[48] Rule No. AGB-824(Sec. 5).
[49] 16 U.S.C.A. 718 D(a).
[50] WIS. STATS. (1953) §227.05.

tions to make regarding methods of reviewing rules and the conservation rule making process in general. Speaking first of the motion seeking to compel the commission to adopt rules, the court felt that in the present case it was not a timely way to challenge the commission's failure to do its duty. The proceedings before the commission were past, the court noted, and the order to which objection was taken had been issued. "The horse is gone," the court said, "it will not help petitioners in this case to lock the stable door now."[51] The court thought it would be appropriate, and criticism of the commission doubtlessly would be avoided, if the commission adopted rules for its own procedures, "to the extent that such rules are practicable."[52] "Ordinarily," the court explained, "rules are necessary only in adversary proceedings but they can be desirable as a prerequisite also to *general* orders." In a most curious bit of reasoning the court then stated:

> "However, the *legislature* has commanded the agency . . . to adopt rules. We *quaere* whether any court should superimpose a court edict and consequent punishment for contempt in the event of disobedience. . . .
> "The legislature has made its mandate. If the commissioners flagrantly are violating it, there is power in the executive to remove them.[53] We are not sure that this is any of the court's business; but, in any event, we *are* sure that petitioners in the precise case at bar are not entitled to a court order that the conservation commission shall adopt rules for myriad proceedings and preliminary to its host of orders—particularly when the particular order in dispute . . . has already been issued."

The petitioner's motion was thus denied by a stroke of logic which seems to imply that a court has not authority to compel an agency created by statute to abide by other statutes governing the agency's conduct.

The court concluded its Ruling on Motions by adopting a liberal view regarding the problem as to whether the petitioner should have brought action under Section 227.05 or under Section 227.15. If it is fatal that petitioner was asking for review and setting aside, instead of a declaratory judgment, the court could so hold when the matter came before it on review, the court explained. Moreover, it occurred to the court that even if it was held that petitioners should have asked

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[51] It might, of course, be argued that a great bulk of commission contemplated action regarding rule making still remained in the stable.

[52] The statute, however, takes no account of practicability, but flatly requires an agency to adopt such rules.

[53] WIS. STATS. (1953) §23.09(2) provides only the manner of appointing commissioners and fixes their terms at six years. No provision establishing methods of removal by the governor is there spelled out. However, WIS. STATS. (1953) §17.07(3) provides that state officers appointed in the fashion of the conservation commissioners may be removed at any time by the governor for cause.

for a declaratory judgment, "they perhaps can amend the 'Wherefore' clause of their petition, without vitiating their petition." "What the petitioner seeks, after all," the court concluded,

> "is the court's declaration, judgment or order—call it what you want—to the effect that section 5 of the commission's Horicon Marsh order of September 17 is invalid. We will reach that essential if and when it is brought before us."

With most of the significant procedural points disposed of prior to the trial, the court's opinion in the case contains little of importance from the standpoint of the rule making process. In answering the charge that the commission's order was so indefinite as not to sufficiently advise the public as to the terms and conditions of the hunt, the court merely noted that the state order was as definite as the federal order from which it garnered its authority. While the "vagueness" argument might be raised in a criminal prosecution, the court explained, it does not militate against the power of either the state or the federal authorities to issue a "controlled hunt" order. Moreover, it does not create interests in these petitioners under Chapter 227. If the federal order is "all wrong" the court concluded, it ought to be challenged in a federal court. The Circuit Court of Dane County, Judge Alvin Reis presiding, then held the federal order lawful and affirmed the commission order.

The Court's Role in Conservation Rule Making

While the role of the courts in the conservation rule making process is not completely clear, some conclusions may be drawn regarding certain facets of judicial review of conservation rules. First, no rules promulgated by the commission have as yet been held invalid by the supreme court. In those cases in which the validity of conservation rules have been challenged before the supreme court, that court has sustained them against charges that they: (1) constituted an illegal delegation of legislative authority (2) violated due process of law (3) violated the equal protection of the laws (4) impaired contractual obligations (5) were arbitrary and unreasonable (6) were class legislation. Moreover, a rule incorporating the concept of strict liability has been sustained when the court held that one might violate a rule prohibiting carrying a rifle in deer country during the closed season, even though no intent to violate the rule prohibiting the shooting of deer in the closed season was found.

The limited number of cases to come before the Supreme Court of Wisconsin in which the problem of judicial review of conservation rules was involved afford some evidence that the court has accorded a presumption of validity to such rules.[54] For example, in the leading

[54] This conclusion is also shared by the staff of the legislative council Committee

case of *State v. Sorenson*,[55] Chief Justice Rosenberry said for the court:

> "There are no facts appearing in the stipulation, nor are there any facts of which the court can take judicial notice, upon which it can be said that these rules and regulations are arbitrary and unreasonable."

A variety of legal methods have been used to test the validity of conservation rules before the courts of the state. In several instances the validity of a rule has been determined in actions brought by the commission to enforce rules and to impose penalties for non-compliance with them.[56] The validity of a conservation rule has also been determined in statutory injunction proceedings.[57] Finally, the validity of a conservation rule has been tested and sustained in proceedings to review an administrative decision as spelled out in Sections 227.15 to 227.21 of the Wisconsin Administrative Procedure Act.[58] This action, however, was permitted only by the Circuit Court of Dane County and the supreme court has never specifically ruled on the permissibility of this method of review of conservation rules although it did permit this procedure in the area of a "contested case."[59] Interestingly enough, the declaratory judgment proceedings outlined in the administrative procedure act have never been used to check the validity of conservation rules although there is some evidence to indicate that such proceedings are regarded by a number of writers as being one of the principal methods to be utilized for the review of agency rules.[60]

A summary of the court decisions involving judicial review of conservation rules reveals the relatively unimportant role played by several of the procedural or jurisdictional niceties often raised by courts in other areas as barriers to a ruling on the substantive issues in a case. For example, the courts have had little to say regarding the timing of review or the so-called "exhaustion of administrative remedies" concept in cases involving conservation rules. (Probably one of the major reasons for the development of this doctrine was that it facilitates orderly procedures and avoids the delay and confusion which would result if a case would be shifted back and forth between the

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on Administrative Rule Making. See: WISCONSIN LEGISLATIVE COUNCIL, INTERIM REPORT ON ADMINISTRATIVE RULE MAKING, No. I, August 1953, pp. 91-92.

[55] 218 Wis. 295, 260 N.W. 662 (1935).

[56] See: State v. Sorenson, 218 Wis. 295, 260 N.W. 662 (1935); State v. Winkler, 255 Wis. 352, 38 N.W.2d 471 (1949).

[57] See: Olson v. Conservation Commission, *op. cit.;* LeClair v. Swift, *op. cit.*

[58] Grange v. Conservation Commission, 93 Dane County Cir. Ct. 179 (1954).

[59] See: Muninghoff v. Conservation Commission, 255 Wis. 252, 38 N.W.2d 712 (1948).

[60] See: Davis, *op. cit.* pp. 748-750; WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING Vol. II, Part II, December 1954, pp. 116-118; WISCONSIN LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE RULE MAKING, LIMITATIONS ON ADMINISTRATIVE DISCRETION, May 1954, pp. 2-4.

court and the agency at every point in the proceedings.) It is true that counsel for the commission raised the "exhaustion" argument in a circuit court case[61] but it was brushed aside with no discussion by the court. While the state supreme court has never discussed the concept in connection with rules of the conservation commission, it has been a concept recognized and applied by the court in other fields.[62]

The 1955 Administrative Procedure Act like its predecessors, however, contains provisions dealing expressly with certain aspects of the exhaustion doctrine. One section[63] provides that a declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question. Moreover, the section relating to review of administrative decisions[64] provides that if a specific statutory provision requires a petition for rehearing as a condition precedent to judicial review, review shall be afforded only after such petition has been filed and determined.

Another procedural factor affecting the availability of judicial review which has had little or no significance in respect to court decisions regarding conservation rules is the concept of "nonreviewability." A considerable case law has been built up on this subject in federal courts.[65] Some examples of actions which have been held to be nonreviewable are an agency's exercise or failure to exercise its prosecuting power and various actions conferring or refusing to confer special benefits. The Wisconsin legislative council committee on administrative rule making found, however, that the doctrine of "nonreviewability" seldom is invoked in connection with review of administrative rules in Wisconsin.[66] The Wisconsin Supreme Court, this committee concluded, generally has based nonreviewability on the ground that the action did not affect any legal right of the petitioner.

The one procedural factor affecting the availability of judicial review of conservation rules which has been of some importance is the concept of an individual's "standing to challenge" the rule in question. The decisions in which such a point is at issue usually speak

[61] Grange v. Conservation Commission, *op. cit.*

[62] For a recent statement see: James Conroy Family Co. v. Milwaukee, 246 Wis. 258, 16 N.W.2d 814 (1944). The citations for other Wisconsin cases involving this point may be found in Holz, *Judicial Review of Quasi-Legislative Order,* 1942 WIS. L. REV. 392 (1942); See also: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p. 125.

[63] WIS. LAWS 1955, c. 221, §227.05(1).

[64] WIS. STATS. (1953) §227.15. This section is unaltered by the 1955 revision of Chapter 227.

[65] See: Davis, *op. cit.,* pp. 812-865; See also: Davis, *Unreviewable Administrative Action,* 15 FED. R.D. 411 (1954); S. A. DeSmith, *Limits of Judicial Review: Statutory Discretion and the Doctrine of Ultra Vires,* 11 MODERN L. REV. 306 (1948).

[66] WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p. 127.

in terms of absence of "legal right." It is difficult, however, to fashion an exact definition of the concept of "legal right." In determining whether the legal rights of the petitioner have been affected, the courts normally give weight to factors such as the directness and magnitude of the injury, the legislative policy, if any, regarding reviewability, the agency's judgment as to whether the person was sufficiently "interested" so as to be permitted to intervene in the proceedings before the agency.[67]

It is impossible to enunciate any general view adopted by the court on this subject since the question is answered on a case-to-case basis. For example, in the *Olson* case,[68] the court ruled the petitioner had no standing or "legal right" to maintain that a commission rule violated a section of the statutes prohibiting rules from changing statutory penalties since the petitioner had not been charged with the violation of any rule. Moreover, in the *Grange* case[69] the Dane County Circuit Court held that while the argument that a commission order was so indefinite as not to sufficiently advise the public of the terms of a "controlled hunt" might be validly raised in a criminal prosecution, petitioner had no legal "interest" to raise this objection in a proceeding to review agency action under Section 227.15 of the statutes.

SUMMARY

The relatively few cases in which the validity of conservation commission rules have been challenged in the courts, while answering some questions as to the scope and method of judicial review, have left a number of significant questions unanswered. Several of the most important might be briefly noted before concluding this discussion. First, the courts have generally shied away from any attempt to outline, even in a rough way, the role of the declaratory judgment provision in the Wisconsin Administrative Procedure Act. The opportunity to clarify the position of this type of action regarding conservation rules presented itself in at least two cases[71] but the courts refused to accept the challenge. As a result there is no case in which a declaratory judgment affecting the validity of a conservation rule (or the rules

[67] For a general discussion of "legal right" or standing to challenge see: Davis, *op. cit.*, pp. 676-717; Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353 (1955); WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, pp. 125-127; WISCONSIN LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE RULE MAKING, LIMITATIONS ON ADMINISTRATIVE DISCRETION, May 1954, p. 8.

[68] Olson v. Conservation Commission, *op. cit.*

[69] Grange v. Conservation Commission, *op. cit.*

[70] For recent cases, not specifically in the field of conservation in which "legal right" or the standing to challenge concept is discussed see: Muench v. Public Service Commission, 261 Wis. 429, 53 N.W.2d 514 (1952); Hecker v. Gunderson, 245 Wis. 655, 15 N.W.2d 788 (1944).

[71] Munninghoff v. Conservation Commission and Grange v. Conservation Commission, *op. cit.*

of any agency for that matter) has been issued. Thus the actual operation of this action, which some have considered to be one of the primary methods for the review of rules, remains shrouded in mystery in Wisconsin.

Secondly, some of the most signifiicant problems raised in administrative law have concerned the distinction between legislative and interpretative rules. The Wisconsin Supreme Court, however, has never had the occasion to discuss this differentiation, insofar as conservation rules are concerned. Thus the problem of retroactive interpretative or legislative rules, which has been condemned by some writers, has not plagued the process of judicial review of conservation rules.[72] The absence of attempts by the court to differentiate between legislative and interpretative rules is understandable since the distinction between the two types of rules often is an arbitrary and difficult one. Up to this point, at least, the uncertainties in law created by a court's attempt to distinguish between legislative and interpretative rules has been avoided in the field of Wisconsin Conservation.

The case law on Wisconsin conservation rules is also uninstructive as to the court's views concerning the reenactment doctrine. This concept, which has been applied in a long series of federal cases particularly in the tax field,[73] can be summarized to mean that the reenactment of a statute is an implied legislative approval of administrative interpretations which may give the interpretation the force of law. The only time reenactment is mentioned in a case involving the regulatory powers of the conservation commission is in *Munninghoff v. Conservation Commission.* However, it was used in a considerably different manner there. The court held that the reenactment of a statute on which there exists a *judicial* determination[74] indicates a legislative intent to adopt the *judicial* determination.[75] Thus no light is cast upon the court's views of reenactment as it applies to administrative action.

Finally, little can be learned from the court decisions involving conservation commission rules as to the scope of judicial review in this area. Moreover, the legislative council committee on administra-

[72] The theory of retroactivity is that a new interpretative rule which results from judicial disapproval of a former interpretation operates retroactively, since it, like a judicial decision construing a statute, merely purports to declare what the statute has always meant.
For a discussion of legislative and interpretative rules and the resulting problem of retroactivity see: Davis, *op. cit.*, pp. 184-229; Note, *Retroactive Operation of Administrative Discretion,* 60 HARV. L. REV. 627 (1947); WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, pp. 123-124; LEGISLATIVE COUNCIL COMMITTEE ON ADMINISTRATIVE RULE MAKING, LIMITATIONS ON ADMINISTRATIVE DISCRETION, May 1954, pp. 5-7.
[73] For a summary of these cases see: Davis, *op. cit.*, pp. 206-211.
[74] In this instance the case alluded to was Krenz v. Nichols, 197 Wis. 394, 222 N.W. 300 (1928).
[75] 255 Wis. at 258.

tive rule making concluded that the case law generally in Wisconsin is uninstructive on this point because prior to 1943, the scope of review of administrative rules depended to a large extent on statutory provisions which varied from one agency to the next and which were repealed when the Administrative Procedure Act was first enacted in 1943.[76]

The most instructive materials concerning scope of judicial review are probably several of the provisions in the Administrative Procedure Act. Section 227.05(5)[77] provides that in a declaratory judgment proceeding the court shall declare a rule invalid if it finds that it: (1) violates constitutional provisions (2) exceeds the statutory authority of the agency (3) was adopted without compliance with statutory rule making procedures. The other section casting some light on the scope of review provides that in review of administrative decisions:[78]

> The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusion or decision being:
>
> (a) Contrary to constitutional rights or privileges; or
> (b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error in law; or
> (c) Made or promulgated upon unlawful procedure; or
> (d) Unsupported by substantial evidence in view of the entire record as submitted; or
> (e) Arbitrary or capricious.

It would seem that if the scope of review prescribed by Section 227.05 is proper in declaratory judgment proceedings, it should also be proper in any other form of proceeding for judicial review of a rule.[79] It should also be noted that the primary difference between the scope of review prescribed for administrative decisions and the scope of review prescribed for administrative rules is that an administrative decision may be held to be void if it is unsupported by substantial evidence in view of the entire record as submitted, while no comparable provision exists in Section 227.05(5) regarding the review of rules. This is understandable, since in most cases rules are not based on any official record of hearing or fact finding, particularly in the field of conservation.

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[76] See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, pp. 121-122; For a discussion of the scope of review as it affects agencies in other states see: I. Topper, *Judicial Review of Decisions of the Ohio Industrial Commission*, 13 OHIO ST. L. J. 455 (1952); R. F. Fuchs, *Judicial Control of Administrative Agencies in Indiana*, 28 IND. L. J. 293 (1953).

[77] While the provisions of this subsection were shifted from subsection (3) to subsection (5) by WIS. LAWS 1955, c. 221, the substance was not altered.

[78] WIS. STATS. (1953) §227.20. This section was not altered by the 1955 revision in the Administrative Procedure Act.

[79] See: WISCONSIN LEGISLATIVE COUNCIL, 1955 Report, ADMINISTRATIVE RULE MAKING, Vol. II, Part II, December 1954, p. 122.