Some Aspects of Evidence in Adjudications by Administrative Agencies in North Carolina

Frank W. Hanft

SOME ASPECTS OF EVIDENCE IN ADJUDICATIONS BY ADMINISTRATIVE AGENCIES IN NORTH CAROLINA†

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I. THE STRICT EVIDENCE REQUIREMENTS OF A 1967 ACT

In 1967 the General Assembly of North Carolina enacted a statute[1] (hereinafter referred to as the 1967 Act) which in its literal language sweepingly reversed a long continued trend in administrative law concerning evidence before administrative tribunals in cases to be decided by them. The tendency in this state, other states, and the federal government had been to relax the rules of evidence in adjudications by administrative agencies.[2]

The 1967 Act defines "administrative agency" as "any State[3] authority, board, bureau, commission, committee, department, or officer authorized by law to make administrative decisions," but it excepts agencies in the legislative and judicial departments of government, the Utilities Commission, the Industrial Commission, the Employment Security Commission, and institutions and agencies operating under chapters 115, 115A, and 116 of the General Statutes which deal with education.[4]

The 1967 Act defines "proceeding" as one before an administrative

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[1] N.C. GEN. STAT. §§ 143-317, -318 (Supp. 1969).

[2] The term "administrative agency" will be used in this article to designate any officer, commission, board, bureau, department, or governmental body other than a court or legislature which, in addition to executive or administrative powers, also has the power to decide cases between litigants—power judicial in nature—and/or the power to make rules and regulations—power legislative in nature. It is the exercise of the power judicial in nature with which we are concerned here.

[3] The use of the term "State" raises the question whether the act applies to county and municipal agencies. N.C. GEN. STAT. §§ 143-306 to -316 (1964), the statute providing generally for judicial review of decisions of administrative agencies, also defines, specifically section 143-306(1), "administrative agency" as any "State" officer, etc. The definitions in section 143-306 were probably used in part in the drafting of the definitions in the 1967 Act; some of the language is verbatim. In Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963), the court applied the general judicial review statute to a municipal agency.

[4] N.C. GEN. STAT. § 143-317(1) (Supp. 1969). Another exception to the application of the 1967 Act is made by N.C. GEN. STAT. § 105-241.1(h) (Supp. 1969), in the case of hearings before the Commissioner of Revenue pursuant to N.C. GEN. STAT. § 105-241 (1965).

agency of the state "wherein the legal rights, duties, or privileges of specific parties are required by law or by constitutional right to be determined after an opportunity for agency hearing."[5] The application of the Act, therefore, is plainly to adjudications and not to the process of making general regulations.[6]

The part of the Act that threw into reverse the trend of the law concerning rules of evidence before administrative agencies is the provision that in all proceedings, "[*i*]*ncompetent*, irrelevant, immaterial, unduly repetitious, and *hearsay* evidence *shall be excluded.* The rules of evidence as applied in the superior and district court divisions of the General Court of Justice *shall be followed.*"[7]

Problems of interpretation are visible. Read literally, the provision that hearsay shall be excluded would apply to all hearsay. But in the law of evidence there are exceptions to the hearsay rule[8] including declarations against interest,[9] entries in the regular course of business,[10] market reports,[11] and many others. It would be extraordinary if evidence admissible before a court and jury in a civil action under exceptions to the hearsay rule were made inadmissible in the less formal proceedings of an administrative agency, and it is difficult to believe that the legislature intended what it literally said. What it probably meant was that hearsay not within any exception to the hearsay rule shall be excluded. This conclusion is borne out by the more general statement in the statute that rules of evidence as applied in the superior and district courts shall be followed. Such rules would not be followed if an administrative agency were to exclude hearsay of the type competent in a court.

But the provision that the rules of evidence *as applied* in the superior and district court divisions shall be followed introduces a further ambiguity. Nothing is said as to whether this means the rules in jury trials or in trials by the judge without a jury. The rules *as applied* in the two types of hearings are not necessarily the same. The Supreme Court of North Carolina has said, in a case in which the lower court admitted

[5] N.C. GEN. STAT. § 143-317(3) (Supp. 1969).

[6] The terms "rule" and "regulation," in accord with the general practice in administrative law, are herein used as synonyms.

[7] N.C. GEN. STAT. § 143-318(1) (Supp. 1969) (emphasis added).

[8] D. STANSBURY, THE NORTH CAROLINA LAW OF EVIDENCE §§ 144-65 (2d ed. 1963) [hereinafter cited as STANSBURY].

[9] *Id.* § 147.

[10] *Id.* § 155.

[11] *Id.* § 165.

hearsay, "But 'in a hearing by the court under agreement of the parties, the rules of evidence are not so strictly enforced as in a trial by jury, since it will be presumed that incompetent evidence was disregarded by the court in making its decision.' "[12] Professor Davis has come to the well documented conclusion that there is no body of rules adhered to by courts in nonjury cases.[13]

Nevertheless, when the provision that the rules of evidence as applied in the superior and district courts shall be followed is read along with the provision that incompetent evidence shall be excluded, it would seem that the legislature intended that the rules as applied in jury trial cases, not cases tried without juries, should be followed. The usual meaning of "competent evidence" is evidence which is admissible in jury trials.[14] The conclusion that the legislature intended to use the term in that sense is bolstered by the provision that hearsay be excluded.

At any rate so far as the administrative agencies' conduct of proceedings is concerned, the 1967 Act, in uncompromisingly positive language, requires exclusion of hearsay and incompetent evidence. It is to be assumed that the state's administrative agencies want to abide by law and also find it prudent to do so. The difficulty is that a great many of them are manned by persons untrained in the law. It is hardly to be expected that they will be conspicuously successful in applying the technical, difficult, and often confused rules of evidence. Even the lower courts frequently are found on appeal to have erred in applying such rules.[15]

A critical question under the 1967 Act is whether, if an administrative agency within the coverage of the Act does err by admitting hearsay or other incompetent evidence, a court on judicial review must hold the decision of the agency to be invalid. Since the 1967 Act flatly states that the incompetent evidence *shall be excluded* and since it says that the rules of evidence as applied in the superior and district courts *shall be followed*, it would seem that the failure of the courts to reverse an administrative

[12] Harris & Harris Constr. Co. v. Crain & Denbo, Inc., 256 N.C. 110, 115, 123 S.E.2d 590, 593-94 (1962), *quoting* 4 J. STRONG, NORTH CAROLINA INDEX 363 (1961). The difference between the rules of evidence in jury trials and trials before a judge sitting without a jury is discussed in STANSBURY § 4a.

[13] 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.04 (1958) [hereinafter cited as DAVIS]. A much different view is set out in 1 F. COOPER, STATE ADMINISTRATIVE LAW 379-87 (1965) [hereinafter cited as COOPER].

[14] 2 Davis § 14.05.

[15] 1 R. BENJAMIN, REPORT, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 174 (1942).

agency which has violated the statute would constitute a refusal to apply the law so positively stated by the legislature. It might, however, be argued that where statutory provisions for judicial review say that the reviewing court *may* reverse for error of law, not that it must,[16] there is room for the Supreme Court of North Carolina to continue to adhere to its usual rule, elaborated hereinafter, that the admission of incompetent evidence will not invalidate an agency's decision so long as there is also competent evidence to support it. A reviewing court finding such error on the part of an administrative agency might hold the error to be non-prejudicial and apply the general rule of judicial review[17] that erroneous admission of evidence is not ground for reversal if the error is non-prejudical.

For the purposes of appraising the 1967 Act, a number of general observations will be made at the inception of this article, some of which will be spelled out in more detail later in this article.

For example, it should be noted that the explosive increase in the number of administrative agencies over the course of less than a century constitutes a highly significant change in the whole legal order. This development may be compared to the appearance of equity centuries ago.[18] Mr. Justice Jackson has stated,

> The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.[19]

Professor Davis brings out the fact that in 1963 the number of civil cases filed in all federal district courts was 63,630, whereas the number of cases filed in the federal administrative agencies numbered in the millions. Most of the administrative adjudications were informal, but even the formal adjudications by the agencies were many times the number of those by the

[16] N.C. GEN. STAT. § 143-315 (1964) (providing generally for judicial review of administrative agency decisions); N.C. GEN. STAT. § 150-27 (1964) (providing for judicial review of decisions of licensing boards).

[17] STANSBURY § 9.

[18] "Administrative law, like equity, developed to meet a common-law deficiency...." P. WOLL, ADMINISTRATIVE LAW, THE INFORMAL PROCESS 8 (1963).

[19] FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (dissenting opinion).

courts.[20] Besides the numerous federal administrative agencies,[21] according to Professor Davis the average state probably has more than one hundred agencies with powers of adjudication or rule making or both.[22] No one knows, he adds, how many administrative agencies have been created by municipalities and other units of local government. "The number may be in the tens of thousands."[23]

The reasons for the phenomenal rise of administrative agencies have a direct bearing on the problem of what the law should be concerning evidence in adjudications by such agencies. Included in the reasons for the rise of the agencies and the granting to them of power to decide a vast variety of cases in the fields of their specialties is the fact that the courts are not specialized and are inexpert in such fields and the belief that their procedures are too slow, cumbersome, and costly.[24] Conversely, there has been a belief that agencies manned by experts deciding cases in the fields of their specialization are able to arrive at better informed decisions more expeditiously than courts. This belief rested in part on the view that by reason of their expertise and specialization, administrative agencies could appraise the value of evidence and determine its weight and that, therefore, they should not be bound by technical rules developed largely to prevent juries from being swayed by evidence of little or no value in the ascertainment of facts.[25]

However, the argument in favor of simply dispensing with the technical rules of evidence in the case of administrative agencies is not conclusive. The expertness of the members of some of the agencies may be more theoretical than real: Their appointment may be for political reasons,

[20] 1 DAVIS § 1.02 (Supp. 1965).

[21] Some idea of the number of federal agencies may be obtained by consulting the list of agencies issuing regulations as revealed by the Table of CFR Titles and Chapters to be found in 1 C.F.R. 231-39 (1970).

[22] 1 DAVIS § 1.02, at 13. N.C. MANUAL 341 (1969), lists governmental boards and commissions. The variety of state administrative agencies is discussed in 1 COOPER 1-2.

[23] 1 DAVIS § 1.02, at 14.

[24] *Id.* § 1.05.

[25] [T]he jury-trial rules are intended for a constantly changing tribunal of fact composed of inexperienced jurymen dealing with hundreds of types of cases. When the tribunal is composed of *experienced professional men*, habitually inquiring day after day into the *same limted class of facts* (as happens with most administrative boards), an expert weighing of evidence can generally be counted upon.

1 J. WIGMORE, EVIDENCE § 4*b*, at 36 (3d ed. 1940) [hereinafter cited as WIGMORE]. Arguments of the proponents of the view that the jury-trial rules should not govern administrative adjudications are set forth in Note, *Administrative Law—Evidence before North Carolina Tribunals*, 19 N.C.L. REV. 568 (1941).

and their conduct may be politically motivated; they may be inclined to make decisions on the basis of surmise and conjecture;[26] in short, they may be subject to inclinations in need of safeguards. A lawyer who has lost a case before an administrative agency on the basis of hearsay evidence may feel that if he had in the hearing room before him those who were the sources of the statements which were produced as hearsay, he could on cross-examination demolish the statements by showing them to be uninformed, biased, or downright false. It is this distrust of results arrived at when rules of evidence are dispensed with that probably accounts for occasional reversions in statutes to the idea of requiring administrative agencies to abide by the rules of evidence.[27] Lawyers who are also members of legislatures may have unsatisfactory experiences with administrative agencies deciding cases of such lawyer-legislators on the basis of incompetent evidence, and such experiences may spur them to bring about the enactment of statutes such as the 1967 Act. It is no complete answer to such a view to say that only reliable hearsay will be considered by an administrative agency. The agency may want to find reliable the evidence which supports what it wants to decide.

Furthermore, if the jury-trial rules are simply dispensed with, there is no other system to replace such rules.[28] A generalization commonly offered as a substitute governing evidence before administrative agencies is that "the kind of evidence on which responsible persons are accus-

[26] Note, 19 N.C.L. REV., *supra* note 25, at 570. "[T]he commissioners, whose terms in office are often short, frequently do not bring to their assignments any particular professional or technical background . . . ." 1 COOPER 5. The statement concerned state administrative agencies. "Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 52 (1936).

[27] An illustration of such a reversion is to be found in the National Labor Relations Act. As originally enacted it provided, concerning unfair labor practice cases before the National Labor Relations Board, "In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling." National Labor Relations Act § 10(b), 49 Stat. 454 (1935), *as amended*, 29 U.S.C. § 160(b) (1964). This language was changed to read, "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . ." Labor Management Relations Act § 10(b), 29 U.S.C. § 160(b) (1964). The 1967 North Carolina Act contains no such language as "so far as practicable."

[28] Professor Wigmore opposed subjecting administrative agencies to the jury-trial rules of evidence, but he also opposed leaving them without any rules at all. He conceded, however, that there was no other system to replace the jury-trial rules. 1 WIGMORE § 4*b*, at 34-35.

tomed to rely in serious affairs" may be utilized.[29] Professor Davis refers to this formula as a guide.[30] That it is an uncertain guide is vouched for by the fact that one federal court stating the formula said that under it hearsay evidence could support a finding,[31] but another federal court said responsible persons are not accustomed to rely on hearsay in serious affairs. The latter court pointed out that the terms "responsible persons" and "serious affairs" are relative in their meaning, and the formula "must leave the trier of facts in confusion worse confounded."[32] Of course whether responsible persons rely on hearsay in serious affairs depends a good deal on the nature of the hearsay and of the affairs. Moreover, members of administrative agencies are not just ordinary men conducting serious affairs; they are persons expert and specialized deciding upon matters within their specialty. These facts look toward the conclusion that the formula should be spelled out in more specific rules or replaced by a formula better adapted to administrative adjudication such as, for example, "evidence persuasive to specialists acting reasonably."

Even though administrative agencies should not be free of controls concerning evidence, it does not follow that the sound solution is to return to the jury-trial rules in adjudications by administrative agencies as did the 1967 Act. For good reasons the great body of administrative law has rejected such a position. Indeed, the relaxation of the rules of evidence before administrative agencies may be an influence working toward a similar result in the courts.[33]

It has been noted that the 1967 Act relates to administrative adjudication, not administrative legislation. The distinction is basic. In making rules and regulations, administrative agencies are far less restricted in the kinds of information they may resort to than they are when deciding cases. When an agency is exercising a legislative function, the hearing

[29] This formula was stated by Judge Learned Hand in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938).

[30] 2 DAVIS § 14.01.

[31] NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938).

[32] Tyne Co. v. NLRB, 125 F.2d 832, 835 (7th Cir. 1942).

[33] 2 DAVIS § 14.17. In a civil antitrust suit a federal court, overruling objections to certain evidence, said, "Yet the original demand for administrative adjudication was traceable, in part at least, to the unwillingness of courts to admit evidence which they allowed administrative agencies to receive and act upon.... To preserve their own jurisdiction the courts must in this type of controversy relax the rigidity of the hearsay rule." United States v. United Shoe Mach. Corp., 89 F. Supp. 349, 356 (D. Mass. 1950). The district court's final decree in the above litigation was rendered in United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

may be of the kind afforded by legislative committees.[34] In legislating, it can be said broadly that the agencies are heirs of the legislative process; in deciding cases, they can be called heirs of the judicial process.

However, labeling the action of an administrative agency as legislative or judicial does not necessarily determine whether the agency may use the broad methods of legislatures in obtaining the information on which to act, or whether it is bound by the restrictions applicable to evidence in adjudications. For example, the Supreme Court of the United States has decided that when an administrative agency prescribes rates for public utilities, its action is legislative,[35] but the Court has also held that when an administrative agency fixes rates, a statutory requirement of a "full hearing" has reference to the tradition of judicial proceedings.[36] The Federal Administrative Procedure Act classifies legislative enactments of administrative agencies as rules, and "rule" includes approval or prescription for the future of rates.[37] Procedure for rule making is set forth in the Act.[38] But it provides that when rules are required by statute to be made on the record after opportunity for an agency hearing, the provisions of two sections governing adjudications,[39] one of which includes evidence requirements,[40] apply instead of the provisions of the subsection on rule making procedure.[41] The classification of rate making in the legislative category, then, obviously does not automatically govern evidence requirements.

[34] Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294 (1933). The distinction between procedure for rule making and for adjudication is carried forward into the Federal Administrative Procedure Act, which provides procedure for rule making [contained in 5 U.S.C. § 553 (Supp. V, 1970)] that is much less exacting than the procedure for adjudication [contained in 5 U.S.C. §§ 554, 556, 557 (Supp. V, 1970)].

[35] Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908).

[36] Morgan v. United States, 298 U.S. 468 (1936). The Court said further that there must be evidence adequate to support necessary findings of fact and that nothing can be treated as evidence which is not introduced as such. In ICC v. Louisville & N.R.R., 227 U.S. 88, 93 (1913), a rate case, the Court said, "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

The Supreme Court of North Carolina has required in a rate case that there be competent, material, and substantial evidence in the record to support the rate base fixed by the Utilities Commission. State *ex rel.* Util. Comm'n v. Public Serv. Co., 257 N.C. 233, 125 S.E.2d 457 (1962).

[37] 5 U.S.C. § 551(4) (Supp. V, 1970).

[38] 5 U.S.C. § 553 (Supp. V, 1970).

[39] 5 U.S.C. §§ 556, 557 (Supp. V, 1970).

[40] 5 U.S.C. § 556(d) (Supp. V, 1970).

[41] 5 U.S.C. § 553 (Supp. V, 1970).

Moreover, in making a decision administrative agencies as well as courts often must determine a rule or policy if none covering the case already exists. In such a case the tribunal commonly goes beyond the record to get such light as it can find. Even courts, more closely bound by requirements of procedure and evidence than is usual for administrative agencies, are increasingly doing their own research in determining the policy or law to govern the case to be decided.[42] Professor Davis[43] points out that in the landmark case of *Durham v. United States*,[44] the court, in holding that a defendant is not criminally responsible if his unlawful act was the product of mental disease or defect, resorted to opinions of large numbers of medico-legal writers not put in evidence. Judges may even informally consult law professors, specialists in their fields, seeking light on law in connection with cases before them.

In administrative adjudications the process of arriving at a remedy in a particular case is not confined to taking evidence as to what the remedy should be and then following the evidence. Of course, if a particular remedy is provided by statute, the statute must be followed, and if the statute provides boundaries or guides as to the remedy, those must be observed. But in fashioning a remedy permissible under its statutory authority, the agency is not confined to evidence taken at the hearing. In *NLRB v. Seven-Up Bottling Co.*,[45] the NLRB had changed its formula for awarding back pay to wrongfully discharged employees. The Supreme Court, in holding valid the application of the new formula, said, "[I]n devising a remedy the Board is not confined to the record of a particular proceeding."[46] The Court justified resort by the Board to its experience and judgment.

II. General Review of Certain North Carolina Statutes

The provisions concerning evidence in administrative adjudications contained in two North Carolina statutes of general application and in several specimen statutes relating to some particular agency will be examined in this part of this article. These provisions cover several matters that will be differentiated: first, the evidence admissible by the agency; second, on what evidence the agency may base its decision; third, the scope of judicial review of the evidence.

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[42] 2 Davis § 15.03.
[43] *Id.*
[44] 214 F.2d 862 (D.C. Cir. 1954).
[45] 344 U.S. 344 (1953).
[46] *Id.* at 349.

A. *The General Judicial Review Statute*

A highly important statute is that which provides generally for judicial review of decisions of administrative agencies.[47] The statute does not by its terms govern the hearings of the agencies before review. Rather, it applies to review of decisions of administrative agencies generally except, among others, those agencies "whose administrative decisions are made subject to judicial review under some other statute or statutes containing adequate procedural provisions therefor."[48] Aggrieved persons are entitled to review under the statute "unless adequate procedure for judicial review is provided by some other statute."[49] The statute gained in importance when the North Carolina Supreme Court held in 1963 that it applies to municipal administrative agencies and that the judicial review provisions in another statute are adequate only if the scope of review therein is equal to that under this statute.[50] Put otherwise, this statute provides the minimum judicial review for decisions of state, including municipal, administrative agencies.

The statute applies when there has been an administrative decision, and "administrative decision" or "decision" is defined as "any decision, order, or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an opportunity for agency hearing."[51]

Save for proceedings by excepted agencies, the statute obviously provides judicial review for decisions in proceedings governed by the 1967 Act since the Act's definition of "proceeding" which the Act covers[52] follows the language quoted above identifying the kind of "proceeding" covered by the judicial review statute. In other words the 1967 Act applies to hearings in defined agency proceedings, and the general judicial review statute provides review of decisions resulting from such proceedings.

The general judicial review statute provides that the reviewing court may reverse or modify the administrative decision:

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[47] N.C. GEN. STAT. §§ 143-306 to -316 (1964), *discussed in A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 382 (1953).
[48] N.C. GEN. STAT. § 143-306(1) (1964).
[49] N.C. GEN. STAT. § 143-307 (1964).
[50] Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963).
[51] N.C. GEN. STAT. § 143-306(2) (1964).
[52] N.C. GEN. STAT. § 143-317(3) (Supp. 1969).

> If the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> . . . .
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.[53]

There is no specific provision for reversal for receiving inadmissible evidence. Such a reversal for admitting evidence contrary to the 1967 Act could, however, be founded on subsections (3) or (4) above.

The evidence necessary to support a decision is stated in subsection (5). If the decision by the administrative agency escapes the condemnation of subsection (5), it would seem to escape subsection (6) also so far as evidence necessary to prevent a decision from being "arbitrary or capricious" is concerned.[54]

Subsection (5) requires "competent" evidence. In a case[55] in which the petitioner's right to improve and rent a house as a two-family dwelling depended on whether two families lived in it at the time a zoning ordinance went into effect, the city board of adjustment had found that the house was occupied as a single-family unit at the time the ordinance went into effect. The board relied on unsworn statements of persons at its hearings, on an affidavit to the effect that affiant had been told in a telephone conversation by a husband and wife that they were the only family in the house on the critical date, and on a letter from the husband to counsel for adverse parties. The court, citing subsection (5), held that the finding of the board was " '(u)nsupported [*sic*] by *competent*, material, and *substantial* evidence in view of the entire record as submitted.' "[56] The court held that

[53] N.C. GEN. STAT. § 143-315 (1964).

[54] In State *ex rel.* Util. Comm'n v. Ryder Tank Line, Inc., 259 N.C. 363, 130 S.E.2d 663 (1963), the court said that what constitutes public convenience and necessity is primarily an administrative question, and the courts will not reverse the exercise of discretionary power by an administrative agency except upon a showing of capricious, unreasonable, or arbitrary action or disregard of law. The court reviewed some of the testimony of witnesses showing the need for proposed service and said, "The evidence of convenience and need is substantial." *Id.* at 367, 130 S.E.2d at 665. Obviously it was the substantial nature of the evidence that allowed the agency's decision to clear the "arbitrary or capricious" hurdle.

[55] Jarrell v. Board of Adjustment, 258 N.C. 476, 128 S.E.2d 879 (1963).

[56] *Id.* at 481, 128 S.E.2d at 883 (emphasis by the court).

the affidavit and letter were incompetent and that the board could not base its finding on unsworn statements.[57]

B. *The Licensing Board Statute*

Another exception set forth in the general judicial review statute to the application of that statute is agencies "whose procedures are governed by chapter 150 of the General Statutes . . . ."[58] Chapter 150,[59] like the general judicial review statute, is a step in the direction of uniformity in administrative law in North Carolina. The chapter applies to twenty-six named administrative agencies licensing occupations.[60] It is noticeable that missing from the list are the North Carolina State Bar,[61] the Board of Medical Examiners of the State of North Carolina,[62] and the Board of Pharmacy.[63]

Chapter 150 provides a hearing to every licensee or applicant for a license before denial of permission to take an examination, denial of a license after an examination for any cause other than failure to pass, withholding renewal of a license for cause other than failure to pay a statutory renewal fee, or suspension or revocation of a license.[64]

The hearings covered by chapter 150 would seem to be governed by

[57] In another case, the State Board of Alcoholic Control suspended beer and wine permits on the ground of sale of beer to a person under eighteen years of age. The court quoted N.C. GEN. STAT. § 143-315(5) (1964), and held that there was no competent evidence that the purchaser was under eighteen. It said that testimony of officers that the purchaser told them his birth date was properly excluded at the hearing as hearsay and held that a certified copy of a birth certificate without testimony that it was the birth certificate of the purchaser was incompetent to prove the purchaser's age. Thomas v. State Bd. of Alcoholic Control, 258 N.C. 513, 128 S.E.2d 884 (1963).

In other beer permit suspension or revocation cases, the court has said the Board's "findings are conclusive if supported by material and substantial evidence." Freeman v. Board of Alcoholic Control, 264 N.C. 320, 323, 141 S.E.2d 499, 501 (1965), *quoted in* Keg, Inc. v. Board of Alcoholic Control, 277 N.C. 450, 456, 177 S.E.2d 861, 865 (1970). The court did not use the word "competent," but the supporting evidence was clearly competent. Therefore, competence was not in issue.

[58] N.C. GEN. STAT. § 143-306(1) (1964).

[59] Chapter 150, which is N.C. GEN. STAT. §§ 150-9 to -34 (1964), is discussed in *A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 378-81 (1953).

[60] N.C. GEN. STAT. § 150-9 (Supp. 1969). The statute establishing the North Carolina Licensing Board for Tile Contractors was held unconstitutional in Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957).

[61] *See* N.C. GEN. STAT. § 84-15 (1965).

[62] *See* N.C. GEN. STAT. § 90-2 (1965).

[63] *See* N.C. GEN. STAT. § 90-55 (1965).

[64] N.C. GEN. STAT. § 150-10 (1964).

the 1967 Act since the "proceedings" governed by the latter are those "wherein the legal rights, duties, or privileges of specific parties are required by law . . . to be determined after an opportunity for agency hearing."[65]

Provisions in Chapter 150 concerning admissibility of evidence before the boards would therefore appear to be superseded by the 1967 Act.[66]

The superseded provisions gave a person the right to present all relevant evidence.[67] It was further provided that the boards *may admit any evidence* and "may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs." However, the same section also recited, "Boards may in their discretion exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence."[68] The reader of Chapter 150 might well be puzzled by the provision which gives a person the *right* to present *all* relevant evidence when another provision gives the board the power to exclude at least some of that evidence on named grounds.

The grounds in Chapter 150 for reversing or modifying a board's decision on judicial review[69] are practically the same as those in the general judicial review statute already discussed. Before the 1967 Act Chapter 150 raised an additional problem. The reviewing court was authorized to reverse or modify a board decision if it was unsupported by competent evidence.[70] But the boards were authorized to give probative effect to "evidence that is of a kind commonly relied on by reasonably prudent men in the conduct of serious affairs." It would seem that this is what "competent" meant for the purpose of the board hearings. Did it mean the same thing for the purposes of judicial review? That the test should be the same[71] is supportable because it would appear incongruous to provide that boards may give effect to evidence meeting the "serious affairs" test and then provide that they may be reversed for

[65] N.C. GEN. STAT. § 143-317(3) (Supp. 1969).

[66] The 1967 Act contains the usual provision repealing all laws and clauses of laws in conflict with the Act. Ch. 930, § 2, [1967] N.C. Sess. L. 1235. It contains no provision repealing specified laws or clauses.

[67] N.C. GEN. STAT. § 150-15 (1964).

[68] N.C. GEN. STAT. § 150-18 (1964).

[69] N.C. GEN. STAT. § 150-27 (1964).

[70] N.C. GEN. STAT. § 150-27(5) (1964).

[71] Professor Stansbury thought so. After quoting the "serious affairs" test, he wrote, "Competency should, however, be judged by the statute and not by the common-law evidence rules." STANSBURY § 4, at n.29. The same view is taken in *A Survey of Statutory Changes in North Carolina in 1953*, 31 N.C.L. REV. 375, 380 (1953).

basing a decision on it. However, an argument the other way can be founded on the fact that the general judicial review statute includes an identical ground for reversal and this latter provision is unaccompanied by anything in the statute indicating any meaning of "competent" other than the usual one. It can be argued that identical provisions are intended to have identical effects.[72]

It may be that the legislature in using the word "competent" in these and other North Carolina statutes did so without having in mind that this could mean a requirement of evidence meeting the jury-trial rules. "Competent" has a lawyer-like ring; it sounds good; who would favor incompetent evidence?

For the purposes of the licensing board statute, this problem concerning the meaning of "competent" in the judicial review section of that statute disappears if the 1967 Act applies because evidence not meeting the jury-trial test of competence would not be admissible before the licensing boards in the first place. However, the previous possibility of the "serious affairs" requirement being the test of what is "competent" illustrates that the meaning of that word may vary with its statutory setting.

C. *The Public Utilities Act*

One of the most important administrative agencies of the state is the North Carolina Utilities Commission. It is expressly excluded from the coverage of the 1967 Act.[73] The provisions of the statute governing evidence before the Commission contrast sharply with those in the licensing board statute. The licensing boards, prior to the 1967 Act, could admit "any evidence"; the Utilities Commission, when acting as a court of record,[74] "shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable."[75] While the licensing boards could give probative effect to evidence meeting the "serious affairs" test,

[72] The writer has found no North Carolina cases applying the evidence provisions of the licensing board statute except one holding that where the North Carolina State Board of Opticians revoked an optician's license, its findings were conclusive on the reviewing court under N.C. GEN. STAT. § 150-27 (1964), because they were supported by "competent, material, and substantial evidence." No light was shed on the meaning of "competent." *In re* Berman, 245 N.C. 612, 97 S.E.2d 232 (1957).

[73] N.C. GEN. STAT. § 143-317(1) (Supp. 1969).

[74] N.C. GEN. STAT. § 62-60 (1965), indicates that the Commission is so acting when conducting hearings, making decisions, and issuing orders.

[75] N.C. GEN. STAT. § 62-65(a) (1965). Subsection (a) also provides, "The Commission may exclude incompetent, irrelevant, immaterial and unduly repetitious or cumulative evidence."

the Public Utilities Act provides, "[N]o decision or order of the Commission shall be made . . . unless the same is supported by competent material and substantial evidence upon consideration of the whole record."[76]

The Public Utilities Act provisions authorizing the court on judicial review to reverse or modify a decision of the Commission[77] follow almost verbatim the parallel provisions of the general judicial review statute and the licensing board statute. However, the utilities statute adds that due account shall be taken of the rule of prejudicial error,[78] and the determination of the Commission is made prima facie just and reasonable.[79]

The question may be raised whether the Commission would be reversed if it failed to apply the "rules of evidence applicable in civil actions in the superior court, insofar as practicable." There are general statements by the North Carolina Supreme Court which, along with the rule of prejudicial error, could be invoked if such a case arises. The court has said, "Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in superior court, nor is it confined by technical rules; substance and not form is controlling."[80]

The quoted statement was not made in connection with evidence before the Commission; however, in a case involving evidence received by the Commission after its hearing, the court noted the above statutory requirement that the Commission apply the rules of evidence and added, "The procedure before the Commission is, however, not as formal as that in litigation conducted in the superior court."[81] The court approved the receipt

[76] N.C. GEN. STAT. § 62-65(a) (1965).

[77] N.C. GEN. STAT. § 62-94(b) (Supp. 1969).

[78] N.C. GEN. STAT. § 62-94(c) (Supp. 1969). This provision was applied in State *ex rel.* Util. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

[79] N.C. GEN. STAT. § 62-94(e) (Supp. 1969). This provision does not prevent the utility from showing on appeal that the findings of the Commission are unsupported by competent, material, and substantial evidence. State *ex rel.* Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964); State *ex rel.* Util. Comm'n v. Atlantic Coast Line R.R., 233 N.C. 365, 64 S.E.2d 272 (1951). In State *ex rel.* Util. Comm'n v. Ray, 236 N.C. 692, 73 S.E.2d 870 (1953), the court pointed out that the statute made the Commission's determination prima facie just and reasonable, rehearsed some of the evidence, and found that the presumption had not been overcome.

[80] State *ex rel.* Util. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 569, 126 S.E.2d 325, 332 (1962), *quoted in* State *ex rel.* Util. Comm'n v. Western Carolina Tel. Co., 260 N.C. 369, 375, 132 S.E.2d 873, 877 (1963).

[81] State *ex rel.* Util. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 269, 148 S.E.2d 100, 109 (1966).

of the evidence in the case but said that the adverse party would have had the right to demand that the hearing be reopened.

In cases in which the Supreme Court of North Carolina finds evidence supporting the Commission's decision or finds such evidence lacking, it is likely to state that there was or was not competent, material, and substantial evidence to support the Commission even if there is no issue as to the competent nature of some *particular* evidence.[82] In a case[83] involving the Commission's denial of a railroad's application to consolidate two agency stations, the court cited the statutory provision requiring that no decision of the Commission be made unless supported by competent, material, and substantial evidence upon the whole record and the parallel provision concerning judicial review. The court rehearsed evidence showing the small amount of shipments to and from the stations, and it held that the Commission's findings and conclusions that a full time agent was needed to meet the public convenience and necessity at one of the stations and that public convenience and necessity at the other could not be met under the railroad's proposed plan were not supported by the evidence. The case, however, did not involve the competency of the particular evidence; rather it involved what the evidence did or did not prove.[84]

Admissibility of evidence, however, was involved in a case concerning increased rates allowed by the Commission to an electric company. The Commission refused to admit evidence of the rates of another company in the area when no evidence of relative cost conditions to the two companies was offered, and the supreme court sustained the Commission.[85] This holding amounts to no more than a determination that the item of evidence was incomplete, and, therefore, irrelevant.

The Commission is authorized by statute to "make and promulgate rules of practice and procedure for the Commission hearings."[86] The Commission has made a rule providing, "Any evidence admissible under the General Statutes of North Carolina, or under the rules of evidence applicable in civil actions in the superior court of this State, will be

[82] State *ex rel.* Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964); State *ex rel.* Util. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 126 S.E.2d 325 (1962).

[83] State *ex rel.* Util. Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).

[84] The latter statement is true also of State *ex rel.* Util. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 146 S.E.2d 511 (1966).

[85] State *ex rel.* Util. Comm'n v. Municipal Corps., 243 N.C. 193, 90 S.E.2d 519 (1955).

[86] N.C. GEN. STAT. § 62-72 (1965).

admissible in investigations and hearings before the Commission."[87] This is a rephrasing of the governing statutory provision and indicates the Commission's disposition to follow the rules of evidence. The Commission has particularized the general provision in an excellent rule stating, "Letters, telegrams and petitions sent to the Commission concerning matters pending before it for hearing violate the rules of evidence, and sending such communications to the Commission, or inducing others to do so, will not be looked upon with favor by the Commission."[88]

D. *The Workmen's Compensation Act*

The Industrial Commission is also excluded from the coverage of the 1967 Act. The statutory provisions concerning evidence before the Industrial Commission under the Workmen's Compensation Act[89] differ widely from those relating to evidence before the Utilities Commission. The Workmen's Compensation Act provides, "Processes and procedure under this article shall be as summary and simple as reasonably may be."[90] The Commission, any of its members, or a deputy, "shall hear the parties at issue . . . and shall determine the dispute in a summary manner."[91] A variation appears concerning asbestosis or silicosis cases, in which the provision for the final hearing states, "[T]he Industrial Commission . . . shall receive all competent evidence bearing on the cause."[92] The Act also provides, "The Commission may make rules . . . for carrying out the provisions of this article."[93]

In contrast with the extensive powers of judicial review elaborated in the general judicial review statute, the licensing board statute, and the Public Utilities Act, the Workmen's Compensation Act provides, "The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact; but either party to the dispute may . . . appeal from the decision of said Commission to the Court of Appeals for errors of law . . . ."[94]

Although this judicial review provision does not mention review of

[87] RULES AND REGULATIONS OF THE NORTH CAROLINA UTILITIES COMMISSION, Rule R1-24(a) (1970).
[88] *Id.* Rule R1-24(i).
[89] N.C. GEN. STAT. §§ 97-1 to -101 (1965).
[90] N.C. GEN. STAT. § 97-80(a) (1965).
[91] N.C. GEN. STAT. § 97-84 (1965).
[92] N.C. GEN. STAT. § 97-61.6 (Supp. 1969).
[93] N.C. GEN. STAT. § 97-80(a) (1965).
[94] N.C. GEN. STAT. § 97-86 (Supp. 1969). Formerly the appeal was to the superior court. Ch. 120, § 60, [1929] N.C. Sess. L. 140.

the evidence before the Commission, such review power is found in review for errors of law. The court on appeal may review the evidence to determine as a matter of law whether there is any evidence to support the Commission's findings.[95] The evidence required must be legally competent. In one case, evidence of statements by an employee who later died of an injury that he received the injury while caddying (his employment) was held insufficient. Moreover, the court stated flatly, "That hearsay evidence is not admissible and has no probative force in the proof of an essential fact at issue is so well established that we need not discuss the same or cite authorities in support thereof."[96]

Hearsay was thus declared to be inadmissible, but an award has been held valid even though hearsay was admitted where there was competent evidence to support the award.[97] The court in that case noted that the Act empowered the Commission to make rules for carrying out the provisions of the Act, that the Act required processes and procedure to be summary and simple, and that it provided that the dispute was to be determined in a summary manner. From these provisions the court concluded that a liberal treatment by the courts of the procedure adopted by the Commission with respect to the reception and consideration of evidence was intended. The court also indicated that the hearsay in the case was acceptable in corroboration or explanation of the circumstantial evidence.

In numerous other cases the court has held that findings of the Commission supported by competent evidence are conclusive on appeal.[98] This

[95] Vause v. Vause Farm Equip. Co., 233 N.C. 88, 63 S.E.2d 173 (1951). In many cases the court states that on judicial review two questions of law for the court are the following: First, whether there was any competent evidence to support the Commission's findings of fact, and, second, whether the facts found were sufficient to support the Commission's conclusions and decision. Byers v. North Carolina State Highway Comm'n, 275 N.C. 229, 233, 166 S.E.2d 649, 651-52 (1969); Moore v. Adams Elec. Co., 259 N.C. 735, 736, 131 S.E.2d 356, 357 (1963); Thomason v. Red Bird Cab Co., 235 N.C. 602, 605, 70 S.E.2d 706, 708 (1952); Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950).

[96] Plyler v. Charlotte Country Club, 214 N.C. 453, 456, 199 S.E. 622, 623 (1938). In Brown v. Asheville Ice Co., 203 N.C. 97, 164 S.E. 631 (1932), the court held that hearsay in the form of evidence of declarations by the employee before his death as to the manner of his injury was incompetent and furnished no basis for setting aside the Commission's order denying compensation.

[97] Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1939). The court also pointed out that timely objection to the hearsay had not been made.

[98] *E.g.*, Hollman v. City of Raleigh, 273 N.C. 240, 159 S.E.2d 874 (1968); Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965); Byrd v. Farmers Fed'n Cooperative, 260 N.C. 215, 132 S.E.2d 348 (1963).

follows even though incompetent evidence was admitted.[99] Conversely, the court holds that where the findings are based on incompetent evidence, they must be set aside.[100]

E. *The Employment Security Law*

A third state agency expressly excluded from the coverage of the 1967 Act is the Employment Security Commission.[101] The provisions for evidence before the Commission and for judicial review not only vary from those of the statutes considered above, but they vary for different proceedings within the agency itself. The Employment Security Law provides, "The Commission shall not be bound by common-law or statutory rules of evidence . . . but shall conduct hearings in such manner as to ascertain the substantial rights of the parties."[102] Conduct of hearings "shall be governed by suitable rules and regulations established by the Commission."[103] The Commission is further empowered to make rules "as it deems necessary or suitable in the administration of this chapter. . . . The Commission shall determine its own . . . methods of procedure in accordance with the provisions of this chapter . . . ."[104]

Under subsection 96-4(m) of the statute, the Commission has power to conduct hearings for determining the rights, status, and liabilities of employers, including determining the amount of contributions due. Appeal is provided to the superior court. When exceptions are made to facts found by the Commission, "[t]he decision or determination of the Commission upon such review in the superior court shall be conclusive and binding as to all questions of fact supported by *any competent evidence*."[105]

However, it is provided by subsection 96-4(r) that claims for benefits shall be prosecuted and determined as provided in section 96-15, which states, "[T]he conduct of hearings and appeals [within the agency] shall be in accordance with rules prescribed by the Commission for determining the rights of the parties, whether or not such rules conform to common-law

[99] Blalock v. City of Durham, 244 N.C. 208, 92 S.E.2d 758 (1956); Carlton v. Bernhardt-Seagle Co., 210 N.C. 655, 188 S.E. 77 (1936).

[100] Citizens Bank & Trust Co. v. Reid Motor Co., 216 N.C. 432, 5 S.E.2d 318 (1939). The incompetent evidence was testimony of a witness, who refused to submit to cross-examination, and testimony from a criminal trial. The court said the evidence should have been excluded.

[101] *See* N.C. GEN. STAT. §§ 96-1 to -27 (1965).

[102] N.C. GEN. STAT. § 96-4(p) (1965).

[103] *Id.*

[104] N.C. GEN. STAT. § 96-4(a) (1965).

[105] N.C. GEN. STAT. § 96-4(m) (1965) (emphasis added).

or statutory rules of evidence and other technical rules of procedure."[106] It is noticeable that the terminology in the provision concerning evidence before the Commission in hearings on claims for benefits varies markedly from the language of the provisions quoted above concerning hearings before the Commission generally. If the substance is intended to be the same, it is not apparent why the words should be different.

Subsection 96-15(i) governing claims for benefits provides for appeal to the superior court in which court, "[t]he findings of the Commission as to the facts, if there is *evidence* to support it . . . shall be conclusive . . . ."[107] Why the one judicial review provision should make the findings conclusive if supported by *any competent evidence* and the other if supported by *evidence* is hard to see.

In a considerable number of cases, the North Carolina Supreme Court has cited subsection 96-4(m) as making the decision or determination by the Commission conclusive on appeal as to all questions of fact supported by any competent evidence, and the supreme court has found in some of these cases that there was[108] such competent evidence, while in one case, there was not[109] competent evidence. However, in none of these cases cited was there a question before the court of the competency of any *particular* item of evidence, nor as to the amount of the evidence. Accordingly, no light was shed on whether literally *any* competent evidence, no matter how little, supporting the findings would make them conclusive on appeal. Furthermore, if supported by competent evidence, the findings are conclusive on appeal although there is evidence the other way.[110]

Oddly enough, the court has cited subsection 96-4(m) in benefit claims cases[111] notwithstanding the provision of subsection 96-4(r) that claims

[106] N.C. GEN. STAT. § 96-15(f) (1965).

[107] N.C. GEN. STAT. § 96-15(i) (Supp. 1969) (emphasis added).

[108] State *ex rel.* Employment Sec. Comm'n v. Coe, 239 N.C. 84, 79 S.E.2d 177 (1953); State *ex rel.* Employment Sec. Comm'n v. Monsees, 234 N.C. 69, 65 S.E.2d 887 (1951); State *ex rel.* Employment Sec. Comm'n v. Kermon, 232 N.C. 342, 60 S.E.2d 580 (1950); State *ex rel.* Employment Sec. Comm'n v. Champion Distrib. Co., 230 N.C. 464, 53 S.E.2d 674 (1949).

[109] State *ex rel.* Employment Sec. Comm'n v. Hennis Freight Lines, Inc., 248 N.C. 496, 103 S.E.2d 829 (1958). The court held that a finding of the Commission was not supported by competent evidence, but the court did not recite any evidence supporting such finding. Apparently the finding was contrary to the terms of a controlling lease agreement.

[110] State *ex rel.* Unemployment Compensation Comm'n v. J.M. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941).

[111] *In re* Stutts, 245 N.C. 405, 95 S.E.2d 919 (1957); State *ex rel.* Employment Sec. Comm'n v. Smith, 235 N.C. 104, 69 S.E.2d 32 (1952).

for benefits shall be prosecuted and determined as provided in section 96-15. Furthermore, in a benefit claims case, the court has said that if findings are supported by competent evidence, they are conclusive and cited subsection 96-15(i) in support of the statement.[112] As noted above, that subsection specifies "evidence" and does not say "competent evidence." In another benefit claims case,[113] the court recited that findings of fact were made conclusive when supported by "any" evidence and cited subsection 96-15(i). The word "any" does not appear in that subsection, though it does in subsection 96-4(m). Further, the court cited among cases giving effect to subsection 96-15(i) a case[114] in which the court actually applied subsection 96-4(m) though it was a benefit claims case.

The writer concludes that the court does not distinguish between the provision specifying "any competent evidence" and that specifying "evidence."

In other benefit claims cases, the court has cited and applied the provision that findings of the Commission are conclusive if there is evidence to support them without, however, having any question before it as to whether incompetent evidence would qualify as evidence. In each case the court said the evidence was "ample."[115]

F. *Some Licensing Agencies Not Included in the Licensing Board Statute*

1. The North Carolina State Bar

The council of the North Carolina State Bar elects the Board of Law Examiners, which is authorized to examine applicants and provide rules and regulations for admission to the bar.[116] In a case[117] in which that

[112] *In re* Abernathy, 259 N.C. 190, 194-95, 130 S.E.2d 292, 296 (1963). On the other hand, in State *ex rel.* Employment Sec. Comm'n v. Jarrell, 231 N.C. 381, 384, 57 S.E.2d 403, 405 (1950), a claims case, the court said the function of the reviewing court is ordinarily, "(1) To determine whether there was *evidence* before the Commission to support its findings of fact; and (2) to decide whether the facts found sustain the conclusions of law and the resultant decision of the Commission" (emphasis added). The court held that the facts found did not support the Commission's conclusion of law and resultant decision.

[113] *In re* Southern, 247 N.C. 544, 547, 101 S.E.2d 327, 329 (1958).

[114] State *ex rel.* Employment Sec. Comm'n v. Roberts, 230 N.C. 262, 52 S.E.2d 890 (1949).

[115] *In re* Stevenson, 237 N.C. 528, 75 S.E.2d 520 (1953); State *ex rel.* Unemployment Compensation Comm'n v. Martin, 228 N.C. 277, 45 S.E.2d 385 (1947).

[116] N.C. GEN. STAT. § 84-24 (Supp. 1969). The section does not prescribe the kind of evidence the Board is to receive, but RULES OF THE BOARD OF LAW EXAMINERS OF NORTH CAROLINA, Rule VIII, § 5 (1970), provides, "All investigations in reference to the moral character of an applicant may be informal, but shall be thorough, with the object of ascertaining the truth. Neither the hearsay rule, nor

Board had denied an applicant permission to take the bar examination based on a finding of fact that the applicant had not been a citizen and resident of North Carolina for twelve months next preceding the filing of the application, the court held that there was "sufficient competent evidence"[118] to support the finding and that the administrative decision was conclusive as to properly supported findings of fact. There was no question raised as to the competent character of any of the evidence.

The council of the North Carolina State Bar or any committee of its members appointed for the purpose of hearing charges or so designated by the supreme court has jurisdiction to hear charges of malpractice, corrupt or unprofessional conduct, or violation of professional ethics made against any member of the bar.[119] The person charged may demand a trial in the superior court or by committee.[120] Trials by committee "shall conform as nearly as practicable to the procedure provided by law before referees in references by consent with the right to appeal to the superior court . . . ." Proceedings in the superior court shall thereafter be conducted in accordance with the laws and rules relating to consent references in civil actions.[121]

Since the proceedings in the superior court on appeal are conducted in accordance with the rules relating to consent references, the judge may " 'affirm, amend, modify, set aside, make additional findings . . . . It is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law.' "[122]

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any other technical rule of evidence need be observed." Whether the 1967 Act displaces this provision would seem to depend on whether the North Carolina State Bar is excepted from the 1967 Act as an agency in the judicial department (see note 126 *infra*) and on whether the applicant is entitled to a hearing before denial of permission to take the bar examination (right to a hearing is a requisite to a proceeding covered by the 1967 Act). That there is the right to a hearing is brought out in Note, *Admission to the Bar—"Good Moral Character"—Constitutional Protections*, 45 N.C.L. REV. 1008, 1014 (1967).

[117] Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

[118] *Id.* at 269, 82 S.E.2d at 97.

[119] N.C. GEN. STAT. § 84-28(1) (1965).

[120] N.C. GEN. STAT. § 84-28(3)d. (Supp. 1969).

[121] N.C. GEN. STAT. § 84-28(3)f. (Supp. 1969). Reference is now governed by N.C.R. CIV. P. 53. The judge after a hearing may adopt, modify, or reject the report of the referee. N.C.R. CIV. P. 53(g)(2).

[122] North Carolina State Bar v. Frazier, 269 N.C. 625, 634, 153 S.E.2d 367, 373 (1967). The court quoted from Anderson v. McRae, 211 N.C. 197, 198-99, 189 S.E. 639, 640 (1937). The statements made in *Anderson* were applicable to instances wherein exceptions were filed to the referee's report. The court's statement seems compatible with N.C.R. CIV. P. 53(g)(2). However, that rule does not expressly make it the duty of the judge to give his own opinion and conclusion on facts and law. *But cf.* N.C.R. CIV. P. 52(a)(1).

The superior court, in a consent reference case, affirmed some of the referee's findings but disapproved others and made substitute findings. The supreme court held that there was nevertheless sufficient competent evidence to support the *material* findings of the referee and the superior court and affirmed the judgment.[123]

One final point should be noted: The North Carolina State Bar statutory provisions[124] make no requirement for exclusion by a trial committee of incompetent and hearsay evidence;[125] therefore, the 1967 Act in its terms imposes this further requirement, assuming the North Carolina State Bar and its agencies are not excepted from the 1967 Act as agencies in the judicial department.[126]

2. The Board of Medical Examiners of the State of North Carolina

A provision of the statute concerning licenses to practice medicine, obviously applicable to denial of license proceedings as well as suspension or revocation proceedings, reads, "In proceedings held pursuant to this article the Board [of Medical Examiners of the State of North Carolina] shall admit and hear evidence in the same manner and form as prescribed by law for civil actions."[127] It is noteworthy that this provision governs what evidence is *admissible* and that it goes far in the direction of the 1967 Act. In a case in which the Board had revoked a license to practice medicine, the supreme court quoted this statutory provision and held that no evidence had been received contrary to its provisions. The court held that examination of the physician as to the previous misconduct was competent for purposes of impeachment.[128]

In the case of denial of a license for cause other than failure to pass an examination, appeal to the superior court is provided. Upon such

[123] Holder v. Home Mortgage Co., 214 N.C. 128, 198 S.E. 589 (1938). The case involved a reference in an action to restrain a sale of real estate under a deed of trust.

[124] N.C. GEN. STAT. §§ 84-15 to -38 (1965).

[125] The council of the North Carolina State Bar and trial committees may formulate rules of procedure governing trials. N.C. GEN. STAT. § 84-28(3) (Supp. 1969). A rule governing trial by committee provides in part, "[R]espondent shall have the right to produce in his behalf all *competent evidence* . . . ." THE NORTH CAROLINA STATE BAR, STATUTES, RULES AND REGULATIONS, CANONS OF ETHICS AND OPINIONS Part V, art. IX, § 2(h) (Melott ed. 1970) (emphasis added). This does not say that incompetent evidence shall be excluded.

[126] The North Carolina State Bar and its agencies are created by statute and are not provided for by article IV of the North Carolina Constitution (Judicial Department).

[127] N.C. GEN. STAT. § 90-14.6 (1965).

[128] *In re* Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967).

appeal, "The decision of the Board shall be upheld unless the substantial rights of the applicant have been prejudiced because the decision of the Board . . . is not supported by any evidence admissible under this article . . . ."[129] It is to be noted that this provision embodies the rule of "prejudicial error"; that the kind of evidence required to support the Board's decision and the kind which is admissible are the same; and that in the literal language of the provision, "any" evidence of the kind required will be sufficient.

Appeal to the superior court is also provided in license suspension and revocation cases. The court may "reverse or modify the decision if the substantial rights of the accused physician have been prejudiced because the findings or decisions of the Board . . . are not supported by competent, material, and substantial evidence admissible under this article."[130] The provision resembles that governing appeal in license denial cases, but whereas the latter specifies "any" evidence of the required kind as the test for the validity of the Board's decision, the former specifies "competent, material, and substantial" evidence of the required kind as the test. Whether the difference in language will produce differences in result is doubtful. The reason for variation in language of the two appeal provisions is not apparent.

3. The Board of Pharmacy

The statute[131] governing the Board of Pharmacy is a good example of a statute governing a licensing agency of the state but which statute makes no provision for the kind of evidence controlling license denial or revocation proceedings and also no provision for judicial review of the Board decisions. The Board may, after notice and hearing, refuse to grant any license, or it may suspend, revoke, or refuse to renew any license issued by it to any pharmacist or assistant pharmacist for causes stated, and it may take like action on the same grounds as to any permits for the operation of a drugstore or pharmacy.[132] Although the statute makes no provision concerning the evidence upon which the Board is to act, the Board has power to adopt rules for the regulation of its proceedings.[133]

[129] N.C. GEN. STAT. § 90-14.1 (1965).

[130] N.C. GEN. STAT. § 90-14.10 (1965). The supreme court has quoted the statute and held upon consideration of all the evidence that it was sufficient to sustain the findings of the Board. *In re* Kincheloe, 272 N.C. 116, 157 S.E.2d 833 (1967).

[131] N.C. GEN. STAT. §§ 90-53 to -85.1 (1965).

[132] N.C. GEN. STAT. § 90-65 (Supp. 1969).

[133] N.C. GEN. STAT. § 90-57 (1965).

But the writer was told by the Secretary-Treasurer of the Board that the Board has made no rules concerning evidence in its hearings and that its hearings are informal. Since notice and hearing are required before the Board may refuse to grant, or suspend, etc., a license or permit, the 1967 Act appears to be clearly applicable.[134] Likewise, since no provision is made for judicial review of these Board actions, the general judicial review statute applies.[135]

III. Aspects of Evidence before Administrative Agencies

At this point some important particular aspects of evidence before administrative agencies adjudicating cases will be discussed from the standpoint of the law generally, without confining the discussion to particular North Carolina statutes.

A. *Admissibility*

With regard to whether it is reversible error for an administrative agency to admit incompetent evidence, including hearsay inadmissible in a jury trial, the matter is resolved when the statute, as in the case of a provision relating to the Employment Security Commission, expressly states that the administrative agency "shall not be bound by common-law or statutory rules of evidence."[136] In the absence of a controlling statutory provision, the law generally and in North Carolina apart from the 1967 Act is that judicial enforcement of evidence rules is relaxed in cases involving administrative proceedings. The Supreme Court of the United States has said, "[I]t has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed."[137] According to Professor Davis, in state court cases in which hearsay or other incompetent evidence has been admitted by an administrative agency, even when done over objection, the court usually invokes the rule that admission of incompetent evidence is no ground for reversal of an order supported by competent evidence. "This result is common whatever the applicable statute may say about admission of or reliance upon incompetent evidence."[138]

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[134] N.C. Gen. Stat. § 143-317(3) (Supp. 1969).
[135] N.C. Gen. Stat. § 143-306(1) (1964).
[136] N.C. Gen. Stat. § 96-4(p) (1965).
[137] Opp Cotton Mills, Inc. v. Administrator of the Wage & Hour Div. of The Dep't of Labor, 312 U.S. 126, 155 (1941).
[138] 2 Davis § 14.08.

It is true that in a workmen's compensation case in North Carolina the supreme court, despite a provision that such disputes shall be determined in a summary manner,[139] stated flatly that hearsay is not admissible.[140] But the ground for invalidating the Commission's award was lack of competent evidence to support its findings, not admission of the incompetent evidence. Moreover, in a case decided the next year, the court considered the applicable statutory provisions and concluded that a liberal treatment by the courts of the Commission's procedure with regard to reception and consideration of evidence was intended.[141]

There are North Carolina cases indicating that incompetent evidence should have been excluded by the Industrial Commission,[142] or was properly excluded,[143] but these fall short of holdings reversing the Commission for admitting incompetent evidence. Conversely, an administrative agency cannot exclude relevant competent evidence. Further, the agency must consider such evidence.[144]

With reference to administrative agencies generally, the supreme court, in refusing to find invalid a suspension of a license to sell beer where incompetent evidence was received, has said, "[T]he rules of evidence before administrative boards permit more latitude than is customary in court proceedings."[145] Even in the case of the Utilities Commission, which is required by statute to apply the rules of evidence applicable in civil actions so far as practicable,[146] the court has said that the procedure before the Commission is not as strict as in superior court, nor is it confined by technical rules.[147]

Further, the rule of prejudicial error must be taken into account; the

[139] N.C. GEN. STAT. § 97-84 (1965).

[140] Plyler v. Charlotte Country Club, 214 N.C. 453, 456, 199 S.E. 622, 623 (1938).

[141] Maley v. Thomasville Furniture Co., 214 N.C. 589, 200 S.E. 438 (1939).

[142] Hildebrand v. McDowell Furniture Co., 212 N.C. 100, 110, 193 S.E. 294, 301 (1937); material cited note 100 *supra*. In West v. North Carolina Dep't of Conservation & Dev., 229 N.C. 232, 49 S.E.2d 398 (1948), a witness had testified to a statement by an employee later deceased. The court said the statement was inadmissible but indicated it would not have been sufficient to show accident in any event.

[143] Little v. Power Brake Co., 255 N.C. 451, 456-57, 121 S.E.2d 889, 892-93 (1961).

[144] *In re* Filing by N.C. Fire Ins. Rating Bureau, 275 N.C. 15, 37, 165 S.E.2d 207, 222 (1969).

[145] Campbell v. North Carolina State Bd. of Alcoholic Control, 263 N.C. 224, 225, 139 S.E.2d 197, 198 (1964). The court has held, however, that in a beer and wine permit suspension hearing, hearsay was properly excluded. Note 57 *supra*.

[146] N.C. GEN. STAT. § 62-65(a) (1965).

[147] Note 80 *supra*.

court has held that the introduction of incompetent evidence cannot be held prejudicial where there is competent evidence to support the findings.[148]

B. *Use of Material Outside the Record*

Administrative agencies, as distinguished from courts, are specialized and commonly expert, and the more important ones ordinarily have staffs of specialists such as accountants and engineers. The agencies often have authority to require reports from the regulated enterprises and in this and other ways accumulate extensive data in their files. A major problem is the extent to which the agencies in adjudicating cases may make use of their own expert knowledge, their staffs, and their accumulated data. The question may arise after a hearing officer has heard a case and finds he needs further information. May he resort to experts on the staff and to the agency's files? The same question may face the agency itself when the trial officer has made an initial or recommended decision that is before the agency for review.

The Supreme Court, in a case in which a finding of the Interstate Commerce Commission rested in part on statistical data taken from annual reports filed with the Commission but not put in evidence, held that this constituted error and said that nothing can be treated as evidence which is not introduced as such. The objection to the use of such data is not lack of authenticity or trustworthiness but lack of notice to the affected parties of the evidence with which they are confronted.[149]

The Supreme Court of North Carolina has taken the same position. Recourse may not be had to records, files, evidence, or data not admitted, agreed, stipulated, or offered in open hearing.[150] The expert knowledge of the Utilities Commission cannot be considered on appeal unless the facts within that knowledge are on the record.[151]

The expert knowledge of the administrative agency may, however, be

[148] Campbell v. North Carolina State Bd. of Alcoholic Control, 263 N.C. 224, 139 S.E.2d 197 (1964); Blalock v. City of Durham, 244 N.C. 208, 92 S.E.2d 758 (1956).

[149] United States v. Abilene & S. Ry., 265 U.S. 274 (1924). The Court's position is criticized in 2 DAVIS § 15.10.

[150] Letterlough v. Atkins, 258 N.C. 166, 169, 128 S.E.2d 215, 217-18 (1962); Biddix v. Rex Mills, Inc., 237 N.C. 660, 663, 75 S.E.2d 777, 780 (1953). "[T]he Commission erred in basing its decision on information it says its files do or do not disclose." *Id.*

[151] State *ex rel.* Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 134 S.E.2d 689 (1964).

used in evaluating evidence.[152] Indeed a truly expert agency, saturated with knowledge on a subject, could not, even if it wanted to do so, weigh evidence within the scope of the subject in ignorance.

C. *Official Notice*

An exception to the rule that evidence must be introduced as such is official notice. Agencies may take official notice of matters of which courts take judicial notice.[153] In addition,

> The rule is now clearly emerging that an administrative agency may take official notice of any generally recognized technical or scientific facts within the agency's specialized knowledge, subject always to the proviso that the parties must be given adequate advance notice of the facts which the agency proposes to note, and given adequate opportunity to show the inaccuracy of the facts or the fallacy of the conclusions which the agency proposes tentatively to accept without proof.[154]

Statutory provisions on official notice are numerous. The Revised Model State Administrative Procedure Act subsection 10(4) provides:

> [N]otice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.

The 1967 Act follows this provision on official notice verbatim.[155]

The quoted provision from the Revised Model Act and the 1967 Act appears to have an ambiguity. It authorizes notice of *generally recognized technical or scientific facts.* But procedurally the parties are to be notified of material noticed, *including staff memoranda or data.* Does the latter

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[152] The 1967 Act provides that an administrative agency's experience, technical competence, and specialized knowledge may be used in the evaluation of the evidence. N.C. GEN. STAT. § 143-318(3) (Supp. 1969). A comparable view is expressed by Hanft, *Utilities Commissions as Expert Courts,* 15 N.C.L. REV. 12, 21-24 (1936). The 1967 Act provision is the same as that in REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(4) (1961). Professor Davis makes the practical point that the provision should include the experience, technical competence, and specialized knowledge of the agency's staff as well as that of the agency. K. DAVIS, ADMINISTRATIVE LAW, CASES—TEXT—PROBLEMS 586 (1965).

[153] 1 COOPER 412; REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(4) (1961); N.C. GEN. STAT. § 143-318(3) (Supp. 1969).

[154] 1 COOPER 412-13. Official notice is discussed in 2 DAVIS §§ 15.01-.14; Hanft, *Utilities Commissions as Expert Courts,* 15 N.C.L. REV. 12, 28-37 (1936).

[155] N.C. GEN. STAT. § 143-318(3) (Supp. 1969).

provision expand what may be officially noticed? That would seem desirable. If procedural safeguards to the parties are afforded, there is no apparent reason why the knowledge and accumulated data of the agency should not be resorted to by the agency.

Professor Davis criticizes the Model Act provision and argues that a distinction should be made between adjudicative facts, which are facts having to do with the parties, and legislative facts, which are those pertaining to law or policy. He suggests different procedures for affording the parties opportunity to contest the different types of facts noticed.[156]

Included in possible procedures to afford affected parties an opportunity to contest facts officially noticed are the following: continuation or reopening of the hearing; or if the hearing is before a trial officer, notation in his initial or recommended decision of the evidence noticed so that it can be contested before the agency itself or notation in the agency's decision of the evidence noticed with opportunity for the parties to request a reopening. Professor Davis holds that where the facts are adjudicative (as distinguished from legislative), disputed, and critical, they should be put in evidence subject to cross-examination and rebuttal.[157]

In North Carolina, a statutory treatment of official notice by a particular administrative agency is found in the Public Utilities Act. The Act provides that all evidence, including records and documents in the possession of the Public Utilities Commission, of which it desires to avail itself shall be made part of the record by reference thereto at the hearing.[158] Most of the data and documents in the Commission's files would seem to come under this provision, but it fails to cover the situation where the data and documents needed do not become apparent until after the hearing when the decision is being prepared. The Act further provides a list of items of which the Commission may take judicial notice,[159] and these include annual reports of public utilities on file with the Commission. No mention is made of special reports[160] or data otherwise accumulated in the files. When a decision relies on judicial notice of material facts, this

[156] K. DAVIS, ADMINISTRATIVE LAW, CASES—TEXT—PROBLEMS 585 (1965). The criticism is contained in a discussion entitled "A Comprehensive Criticism of the Revised Model State Administrative Procedure Act." *Id.* 581.

[157] 2 DAVIS § 15.10.

[158] N.C. GEN. STAT. § 62-65(a) (1965).

[159] The term "judicial" instead of "official" notice is used since the provision applies when the Commission is acting as a court of record. N.C. GEN. STAT. § 62-65(a) (1965).

[160] The Commission may require special reports. N.C. GEN. STAT. § 62-36 (1965).

shall be stated with particularity in the decision, and any party on petition after service of the decision shall be afforded an opportunity to contest in a rehearing the purported facts noticed. But the Commission *may* notify the parties before or during the hearing of the facts judicially noticed and afford opportunity at the hearing to contest them.[161] The opportunity to contest noticed facts in a rehearing after a decision handicaps the party since he must induce the agency to change a decision already made.[162]

An official notice statute along the lines suggested in the above discussion of the Revised Model Act and applicable to administrative agencies generally could be an improvement on these provisions of the Public Utility Act.

A variation on the usual set of facts in which official notice is involved appeared in a North Carolina case. Usually official notice involves facts or evidence existing at the time of the hearing. In the North Carolina case, the facts arose subsequent to the hearing. The court, after noting that the procedure before the Commission is not as formal as that in the superior court, stated that the statutes prescribing procedure for Commission hearings do not prohibit it from making a finding as to an applicant's ability to render service on the basis of facts arising between the conclusion of the hearing and the entry of the order when those facts are shown by late exhibits and the adverse party has had adequate notice that the exhibits have been filed with the Commission for inclusion in the record. The court pointed out that the adversely affected party unquestionably had the right to demand a reopening of the hearing for the purpose of cross-examination and rebuttal evidence, but the court cited no authority for this unquestionable right. However, the adversely affected party had sought no such reopening.[163]

D. *Affidavits*

Professor Wigmore states that mere affidavits are inadmissible.[164] The Court of Appeals of North Carolina, in a child custody case not involving an administrative agency,[165] stated most impressive reasons why an affidavit is an inherently weak method of proof. Those reasons included lack of cross-examination, "which provides the best instru-

[161] N.C. GEN. STAT. § 62-65(b) (1965).

[162] 2 DAVIS § 15.10.

[163] State *ex rel.* Util. Comm'n v. Carolina Tel. & Tel. Co., 267 N.C. 257, 148 S.E.2d 100 (1966).

[164] 5 WIGMORE § 1384; 6 *Id.* § 1709. Some exceptions are noted.

[165] *In re* Custody of Griffin, 6 N.C. App. 375, 170 S.E.2d 84 (1969). The court discussed exceptions in limited situations to the inadmissibility of affidavits.

mentality our experience has yet devised for assessing the true value of testimony."[166] The objections which the court noted to affidavits appear equally strong when administrative adjudications are involved.[167]

According to Professor Wigmore, statutes in numerous jurisdictions "permit a party to file an affidavit, with notice, and await the opponent's counter-notice either disputing the affidavit or demanding cross-examination of the affiant; in the absence of such counter-notice, the affidavit may be used at trial." This is a "virtual waiver" of the right of cross-examination.[168]

North Carolina has a comparable statute applicable in connection with evidence before the Public Utilities Commission. The statute provides for mailing or delivery by any party or the Commission to the opposing parties of a copy of any affidavit proposed to be used in evidence, together with a notice containing the name and address of the affiant and a statement that he will not be called to testify orally nor be subject to cross-examination unless the opposing parties or the Commission demand the right of cross-examination by notice. Unless the opposing party or the Commission mails or delivers to the proponent a request to cross-examine at the hearing, the right to cross-examine is waived and the affidavit, if introduced, has the same effect as if the affiant had testified orally. If opportunity to cross-examine is not afforded after the request, the affidavit shall not be received in evidence.[169]

If a similar statutory provision for use of affidavits by administrative agencies generally were adopted, it would probably eliminate the objections to their use.

E. *Privilege*

The Revised Model State Administrative Procedure Act states flatly that in contested cases, "Agencies shall give effect to the rules of privilege recognized by law."[170] The same position is taken in substance in various

[166] 6 N.C. App. at 378, 170 S.E.2d at 85-86. The court reversed the lower court for admitting affidavits as to the mother's unfitness.

[167] Note, *Administrative Law—Evidence—Hearsay and the Right of Confrontation in Administrative Hearings*, 48 N.C.L. REV. 608 (1970), criticizes the holding of Peters v. United States, 408 F.2d 719 (Ct. Cl. 1969), that an administrative adjudication founded on affidavits is valid.

[168] 5 WIGMORE § 1382.

[169] N.C. GEN. STAT. § 62-68 (1965).

[170] REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(1) (1961). Professor Davis approves, 2 DAVIS § 14.06, and mentions three instances of privilege—that against self-incrimination, attorney and client, and offer of compromise—which should be the same in administrative as in judicial proceedings. *Id.* § 14.08, at 286-87.

North Carolina statutes,[171] including the 1967 Act,[172] but the provisions are fragmentary in that they do not apply to all administrative agencies. A uniform provision like that in the Model Act might well be enacted for this state. Recognition of a privilege is a policy decision concerning which the nature of the tribunal seems irrelevant.

F. *Substantial Evidence*

The Federal Administrative Procedure Act[173] and at least one North Carolina statute[174] lay down as one requirement for the evidence on which an administrative agency may base a decision that the evidence be "substantial." These provisions are directed to the agency. The Federal Administrative Procedure Act also makes this same requirement for evidence supporting an agency's decision and findings on judicial review,[175] and North Carolina statutes commonly lay down "substantial evidence" as one such requirement.[176]

Professor Davis states that the dominant tendency in both state and federal courts is toward the substantial evidence rule, that under it the court limits itself to the test of reasonableness in reviewing findings of fact, and that the judicial tendency toward the substantial evidence rule is so strong that the rule is often followed even when the statute provides a narrower or broader scope of review.[177]

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[171] The licensing board statute provides that in license suspension, revocation, or nonrenewal cases, rules of privilege shall be applicable as in proceedings before the courts of this state. N.C. GEN. STAT. § 150-18 (1964). When the Utilities Commission acts as a court of record, the rules of privilege shall be effective as in civil actions in the superior court. N.C. GEN. STAT. § 62-65(a) (1965). The statute governing proceedings by the Board of Medical Examiners provides that it shall admit evidence in the same manner as prescribed by law for civil actions. N.C. GEN. STAT. § 90-14.6 (1965). This provision would obviously make the rules of privilege the same as in such court proceedings. A provision relating to the Employment Security Commission denies the privilege against self-incrimination but contains an immunity clause. N.C. GEN. STAT. § 96-4(j) (1965).

[172] N.C. GEN. STAT. § 143-318(1) (Supp. 1969), provides that the rules of evidence applied in the superior and district court divisions of the General Court of Justice shall be followed.

[173] 5 U.S.C. § 556(d) (Supp. V, 1970).

[174] N.C. GEN. STAT. § 62-65(a) (1965) (concerning the Public Utilities Commission).

[175] 5 U.S.C. § 706(2)(E) (Supp. V, 1970).

[176] N.C. GEN. STAT. § 62-94(b)(5) (Supp. 1969); N.C. GEN. STAT. § 90-14.10 (1965); N.C. GEN. STAT. § 143-315(5) (1964); N.C. GEN. STAT. § 150-27(5) (1964).

[177] 4 DAVIS § 29.01. The substantial evidence test is criticized in 2 COOPER 724-29 on the ground, among others, that it fails to provide a meaningful criterion for judicial review.

The Supreme Court has read "evidence" to mean "substantial evidence."[178]

Up to this point in this article, much of the discussion has been concerned with the question of the kind of evidence required for administrative adjudications. The substantial evidence requirement goes beyond the question, "what kind," to include the question, "how much." The Supreme Court has said, "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[179] It "must do more than create the suspicion of the existence of the fact to be established. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[180]

However, the substantial evidence rule is a variable.[181] Lack of uniformity in results has led to criticism of the rule,[182] but a realistic statement by the Supreme Court should be borne in mind. The Court said, "A formula for judicial review of administrative action . . . cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging. . . ."[183]

The Supreme Court of North Carolina, in a number of cases, has decided whether an administrative agency's findings were supported by "competent, material and substantial evidence" without indicating any test as to how much evidence would be deemed substantial.[184] But in one

[178] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); Washington, Va., & Md. Coach Co. v. NLRB, 301 U.S. 142, 146-47 (1937).

[179] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[180] NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939). The quoted language is repeated in Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), and the stated test of enough evidence to justify refusal to direct a verdict remains the law under the Administrative Procedure Act. 4 DAVIS § 29.02, at 120.

[181] 4 DAVIS § 29.02.

[182] 2 COOPER 725.

[183] Universal Camera Corp. v. NLRB, 340 U.S. 474, 488-89 (1951).

[184] State *ex rel.* Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 389, 134 S.E.2d 689, 693-94 (1964) (The court found no evidence to support the Commission's findings.); Jarrell v. Board of Adjustment, 258 N.C. 476, 481, 128 S.E.2d 879, 883 (1963); State *ex rel.* Util. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 571, 126 S.E.2d 325, 334 (1962). In State *ex rel.* Util. Comm'n v. Ryder Tank Line, Inc., 259 N.C. 363, 130 S.E.2d 663 (1963), the court rehearsed some of the direct testimony of witnesses showing the need for proposed service and pronounced the evidence "substantial." There could have been no doubt about it.

case it did say that "substantial" evidence is "more than a scintilla."[185]

In a recent case[186] in which the Utilities Commission had allowed a rate increase, the court analyzed evidence and other findings of the Commission and said that the Commission's finding as to the fair value of the utility's property "must be deemed unsupported by substantial evidence in the record."[187] Here apparently "substantial evidence" meant evidence which upon analysis would lead to the finding.

G. *The Whole Record Rule*

On the issue whether an administrative adjudication is supported by substantial evidence, it can be argued that only the evidence supporting the agency decision need be looked to; if it is substantial, the decision meets the test. The Supreme Court in a leading case stated that the Court's prior phrasing of the process of review "readily lent itself to the notion that it was enough that the evidence supporting the Board's [National Labor Relations Board's] result was 'substantial' when considered by itself."[188] The Court noted the widespread criticism of this view and the change made by the Federal Administrative Procedure Act which provided, as quoted by the Court, that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence. . . . In making the foregoing determinations the court shall review the *whole* record or such portions thereof as may be cited by any party . . . ."[189]

The Court held that under the whole record provision of the Federal Administrative Procedure Act, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."[190] Put otherwise, substantiality is not determined by viewing in isolation the evidence supporting the administrative agency, but by viewing it in the light of the rest of the evidence in the record to see if it is still substantial when so viewed.

The Federal Administrative Procedure Act also prescribes the whole record rule for the administrative agency in making its determination.[191]

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[185] State *ex rel.* Util. Comm'n v. Great S. Trucking Co., 223 N.C. 687, 690, 28 S.E.2d 201, 203 (1943).

[186] State *ex rel.* Util. Comm'n v. Morgan, 277 N.C. 255, 177 S.E.2d 405 (1970).

[187] *Id.* at 270, 177 S.E.2d at 415.

[188] Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-78 (1951).

[189] *Id.* at 482-83 n.15 (emphasis by the Court). These provisions, with some slight changes in arrangement and wording not affecting the substance, are now part of 5 U.S.C. § 706 (Supp. V, 1970).

[190] Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

[191] 5 U.S.C. § 556(d) (Supp. V, 1970).

The whole record rule has been supported by writers on administrative law[192] and widely adopted.[193] Whatever the test of the sufficiency of the evidence, the evidence is to be viewed in the light of the whole record. Thus, the Revised Model State Administrative Procedure Act specifies,

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> . . . .
>
> (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . . .[194]

The statutes in North Carolina concerning the whole record requirement are diverse. One of the statutes set forth above which concern North Carolina administrative agencies prescribes the whole record rule to be followed by the agency, namely the Utilities Commission.[195] The whole record rule is also prescribed in the most important North Carolina statutory provisions for judicial review of administrative agency adjudications, including the general judicial review statute, quoted earlier, the language of which is closely followed in the licensing board statute[196] and the Public Utilities Act.[197]

The requirement for the agency's evidence on judicial review is different in the quoted provision of the Revised Model State Administrative Procedure Act from the provision quoted previously from the North Carolina general judicial review statute, but whether the requirement, whichever it may be, is met is to be determined on the whole record under both provisions.

On the other hand, some North Carolina statutes, if their language is taken literally, are directly contrary to the whole record rule. The statute covering appeal from the Employment Security Commission in claims cases provides that the Commission's findings of fact are conclusive "if there is evidence" to support them.[198] In cases involving the rights, status, and liabilities of employers, the language is more emphatic: The Commission's decision shall be conclusive "as to all questions of fact

[192] 4 DAVIS § 29.03; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 601 (1965). The whole record rule is briefly discussed by Hanft, *Administrative Law, Survey of North Carolina Case Law*, 45 N.C.L. REV. 816 (1967).

[193] 2 COOPER 730-33 cites some state statutes embodying the rule.

[194] REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(g) (1961).

[195] N.C. GEN. STAT. § 62-65(a) (1965), *quoted* p. 649 *supra*.

[196] N.C. GEN. STAT. § 150-27 (1964).

[197] N.C. GEN. STAT. § 62-94(b) (Supp. 1969).

[198] N.C. GEN. STAT. § 96-15(i) (Supp. 1969).

supported by *any competent* evidence."[199] In appeals from denials of a medical license, the decision of the Board of Medical Examiners is to be upheld unless the decision is not supported by "any evidence admissible under this article."[200] In appeals in license suspension and revocation cases, the test is "competent, material, and substantial evidence admissible under this article."[201] The emphatic word "any" does not appear.

One important statute, that governing appeals from the Industrial Commission,[202] makes no provision at all concerning what evidence is sufficient to support the Commission's decision or findings on appeal.

The North Carolina cases concerning the whole record rule are, so far as the language of the court goes, highly diverse. In a case involving an appeal from the Utilities Commission, the court set out both the statutory provision requiring the Commission to act upon competent, material, and substantial evidence upon consideration of the whole record and the provision authorizing reversal on judicial review for lack of support by such evidence in view of the entire record. The court on rehearsal of the evidence concluded that it did not support the findings.[203] The case, however, was one in which the court found *no evidence* supporting the Commission's finding concerning public convenience and necessity, and, thus, there was no whole record problem involving evidence supporting the Commission's findings being viewed in the light of contrary evidence.

In other cases involving appeals from the Utilities Commission, the court in a variety of situations has made pronouncements on the evidence before the Commission. The court has stated that the Commission's findings of fact were supported by competent, material, and substantial evidence without adding such language as "on the whole record."[204] The question in the case, however, was what the evidence showed. The court in another case said that the Commission's findings are binding on appeal if supported by competent, material, and substantial evidence, again without adding any whole record language.[205] The court found no evidence supporting the findings. In neither of these last two cases did any whole record

[199] N.C. GEN. STAT. § 96-4(m) (1965) (emphasis added).
[200] N.C. GEN. STAT. § 90-14.1 (1965).
[201] N.C. GEN. STAT. § 90-14.10 (1965).
[202] N.C. GEN. STAT. § 97-86 (Supp. 1969).
[203] State *ex rel.* Util. Comm'n v. Atlantic Coast Line R.R., 268 N.C. 242, 150 S.E.2d 386 (1966).
[204] State *ex rel.* Util. Comm'n v. Carolinas Comm. for Indus. Power Rates & Area Dev., Inc., 257 N.C. 560, 571, 126 S.E.2d 325, 334 (1962).
[205] State *ex rel.* Util. Comm'n v. Carolina Coach Co., 261 N.C. 384, 389, 134 S.E.2d 689, 693 (1964).

problem appear. In another case the court did say that a court on appeal is to review the whole record or parts cited,[206] but said that there was ample competent evidence to support the Commission's finding.[207] Again, no whole record problem appeared. In a different case, the court recited the whole record formula[208] but found the evidence to be clear and undisputed and to be contrary to the Commission's finding.[209] This being so, the outcome would again have been the same without the whole record provision.

However, two decisions are more to the point. In one in which there was evidence both ways, the court held that the Commission's findings were supported by competent, material, and substantial evidence in view of the entire record.[210] In the other case the court held that the Commission's finding was not so supported although there was some evidence supporting it.[211]

Since the review of evidence provisions under the general judicial review statute and the licensing board statute are the same as those in the statute providing for review of decisions by the Utilities Commission, these precedents have value under the other two statutes.

Cases applying the statutory provisions making the findings of the Employment Security Commission conclusive if supported by "any competent evidence" and "evidence" respectively have been reviewed previously in this article.[212] The language of the statutory provisions and accordingly the tests applied in the court decisions are at variance with the whole record rule.

In North Carolina cases involving judicial review of decisions by the Industrial Commission for which there is no statutory provision concerning review of the evidence, there are diverse statements concerning such review. In one of them[213] the only evidence that an employee was killed by electric shock while working on a pole was the testimony of a doctor that if the employee had come into contact with electric current,

[206] State *ex rel.* Util. Comm'n v. Nello L. Teer Co., 266 N.C. 366, 373, 146 S.E.2d 511, 516 (1966).

[207] *Id.* at 377, 146 S.E.2d at 519.

[208] State *ex rel.* Util. Comm'n v. Gulf-Atlantic Towing Corp., 251 N.C. 105, 109, 110 S.E.2d 886, 889 (1959).

[209] *Id.* at 112, 110 S.E.2d at 891.

[210] State *ex rel.* Util. Comm'n v. Champion Papers, Inc., 259 N.C. 449, 130 S.E.2d 890 (1963).

[211] State *ex rel.* Util. Comm'n v. Atlantic Coast Line R.R., 233 N.C. 365, 64 S.E.2d 272 (1951).

[212] Pp. 654-55 *supra.*

[213] Petree v. Duke Power Co., 268 N.C. 419, 150 S.E.2d 749 (1966).

it could have caused the death. The court pointed out that overwhelming evidence showed that the electricity had been turned off where the employee was working. There was other evidence that the employee had suffered no electric shock. The court said, "It is so well settled that if there is *any* evidence upon which the Commission can base its findings they must be upheld we need cite no authorities. But it is equally correct that the Commission's findings must be supported by *some* evidence."[214] The language of the court is emphatically contrary to the whole record rule, but the holding invalidating the award is plainly in accord with it.

In another case[215] there was evidence that an employee's disability was caused by accident arising out of and in the course of his employment, but there was also evidence of the employee's history of osteomylitis and of an operation for it about ten years before the accident. The court in reversing the lower court, which had set aside an award by the Commission, said, "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding."[216] The court did not mention the whole record rule, and the outcome may well have been the same under it, but again the language of the court is contrary to that rule.

The court has said that the Commission's findings of fact are conclusive on appeal if supported by "any evidence"[217] in a case in which it found no evidence to support the findings and which therefore did not involve application of the whole record rule, although the court's language negated it. The court has also said that the Commission's findings are conclusive when supported by "competent evidence,"[218] but in the same connection the court has used the language "any competent evidence."[219]

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[214] *Id.* at 420, 150 S.E.2d at 750 (emphasis by the court).

[215] Anderson v. Lincoln Constr. Co., 265 N.C. 431, 144 S.E.2d 272 (1965).

[216] *Id.* at 434, 144 S.E.2d at 274. In Hollman v. City of Raleigh, 273 N.C. 240, 249, 159 S.E.2d 874, 880 (1968), the court quoting *Anderson* again stated that the reviewing court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. However, in this case the question was as to the weight and sufficiency of the evidence supporting the award, and that evidence was not considered in connection with contrary evidence.

[217] Hensley v. Farmers Fed'n Coop., 246 N.C. 274, 276, 98 S.E.2d 289, 290-91 (1957).

[218] Byrd v. Farmers Fed'n Coop., 260 N.C. 215, 216, 132 S.E.2d 348, 348-49 (1963). (The decision involved a conclusion from the evidence, not conflicting evidence.); Graham v. Wall, 220 N.C. 84, 88, 16 S.E.2d 691, 693 (1941). (The decision involved a conclusion from the evidence.)

[219] Penland v. Bird Coal Co., 246 N.C. 26, 30, 97 S.E.2d 432, 435 (1957); see note 95 *supra*. In *Penland* the court held that an injured employee's statements to his doctor in the course of professional treatment or during examination may be

In two recent cases decided by the Court of Appeals of North Carolina in which there was medical testimony both for and against an employee's claim, the court upheld the determination of the Commission. In one of the cases,[220] the court said that the Commission's finding must be accepted if supported by "competent evidence,"[221] and in the other[222] it said that the question for the court was whether there was "sufficient competent evidence" to support the finding[223] and that where the evidence is contradictory, the findings are conclusive.[224] In another recent case[225] the court used the more emphatic term, "any competent evidence,"[226] but the case was one in which all the medical evidence supported the finding.

The writer concludes that the North Carolina courts, in describing the evidence sufficient to make the findings of the Industrial Commission conclusive on appeal, frequently use the terms "any evidence," "competent evidence," and "any competent evidence" interchangeably.[227] Law would be more simple, definite, and ascertainable if the same language were used wherever the same meaning is intended, but legislatures, courts, and legal writers—the present writer included—do not consistently adhere to any such ideal.

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testified to by the physician to show the basis of his opinion. The court said that this testimony, plus that of the employee, was ample competent evidence to support the Commission's findings of fact. However, the court in a later case, Todd v. Watts, 269 N.C. 417, 152 S.E.2d 448 (1967), seemed to recede from its view in *Penland* as to the admissibility of such testimony of a physician. STANSBURY § 136 (Brandis Supp. 1970). The *Todd* case is discussed in Note, *Evidence—Expert Testimony—Physician's Opinion Based on Patient's Statements*, 46 N.C.L. REV. 960 (1968).

[220] Rooks v. Ideal Cement Co., 9 N.C. App. 57, 175 S.E.2d 324 (1970).

[221] *Id.* at 58-59, 175 S.E.2d at 325-26.

[222] Priddy v. Blue Bird Cab Co., 9 N.C. App. 291, 176 S.E.2d 26 (1970).

[223] *Id.* at 296, 176 S.E.2d at 29.

[224] *Id.* at 298, 176 S.E.2d at 30.

[225] Snead v. Sandhurst Mills, Inc., 8 N.C. App. 447, 174 S.E.2d 699 (1970).

[226] *Id.* at 450, 174 S.E.2d at 701.

[227] In Thomason v. Red Bird Cab. Co., 235 N.C. 602, 605, 70 S.E.2d 706, 708 (1952), the court said the Commission's findings of fact are conclusive and binding on the courts if they are supported by "competent evidence," but it also said that on appeal the superior court is limited to two questions of law, one of which is whether there was "any competent evidence" to support the Commission's findings. The case, however, involved "inadequacy" of the findings. The same two statements are also made in Henry v. A.C. Lawrence Leather Co., 231 N.C. 477, 479, 57 S.E.2d 760, 762 (1950), in which the court held there was no evidence to support the findings. In Vause v. Vause Farm Equip. Co., 233 N.C. 88, 93, 63 S.E.2d 173, 177 (1951), the court said a finding by the Commission is conclusive if supported by "the evidence," but it also said that the finding was conclusive if supported by "evidence," and it added that on appeal the court may determine whether there is "any evidence" to support the findings. The court held that none of the evidence supported the finding that the injury arose out of the employment.

The following statement may be a realistic version of judicial review of the evidence supporting findings of the Industrial Commission:

> It is the duty of the court to determine whether, in any reasonable view of the evidence, it is sufficient to support the critical findings necessary to permit an award of compensation. . . . If there is any evidence of substance which directly, or by reasonable inference, tends to support the findings, the courts are bound by them, "even though there is evidence that would have supported a finding to the contrary."[228]

No reason is apparent why the whole record requirement should be provided by statute to govern one administrative agency in adjudicating cases, but not other administrative agencies; nor why the requirement should exist in some statutes providing for judicial review of the evidence before some administrative agencies, but not in other statutes providing judicial review of other agencies. A statute should be enacted applicable to administrative agencies generally, and as in the case of the Federal Administrative Procedure Act, the statute should establish the whole record requirement for the agencies themselves in adjudicating cases and for the courts on judicial review of the evidence, whatever may be the prescribed nature of the evidence. Such a requirement for the agency itself is exceptional in North Carolina, and it could be argued that it is not needed since if the whole record rule is prescribed for judicial review, any failure of the agency to observe it can be corrected. This overlooks the facts that the agency's decision may not be appealed even when erroneous and that the agency should be conscious of the rule in making its determination. It is likely to have the rule in mind if the rule is in a statute applicable to the agency's own procedures.

H. *The Residuum Rule*

The leading case establishing the residuum rule is *Carroll v. Knickerbocker Ice Co.*[229] In that case New York's Workmen's Compensation Commission found as a fact that Carroll, an employee, was putting ice in the cellar of a saloon when the ice tongs slipped and a three-hundred-pound cake of ice fell on him, striking him in the abdomen. The only evidence supporting this finding as to how Carroll was injured was testi-

[228] Keller v. Electric Wiring Co., 259 N.C. 222, 223, 130 S.E.2d 342, 343 (1963). The question was what the evidence showed, and no whole record question appeared.

[229] 218 N.Y. 435, 113 N.E. 507 (1916).

mony of witnesses who related what Carroll had told them after the accident. He died in delirium tremens six days after the alleged accident. Opposed to the hearsay testimony was that of a helper on the ice wagon and two cooks employed in the saloon who testified that they were present at the time and place of the alleged injury and that they did not see any cake of ice fall. The physicians who examined the employee testified that there were no bruises, discolorations, or abrasions on the surface of his body. The court, in holding invalid an award of compensation, pointed out that a statute provided that the Commission shall not be bound by common law or statutory rules of evidence but may conduct the hearing in such manner as to ascertain the substantial rights of the parties. The court accordingly held that the award could not be overturned on account of any alleged error in receiving evidence. The court then said, "[S]till in the end there must be a residuum of legal evidence to support the claim . . . ."[230]

The court employed the residuum rule to reach a sound result. The court must have been aware of the usual cause of delirium tremens although this went unmentioned in the opinion. The direct evidence against an injury caused by the fall of a cake of ice was formidable. Therefore, the same result could have been reached by application of the whole record rule, but that rule did not appear on the legal scene until much later.

The residuum rule was widely adopted, but it was and remains highly controversial. Professor Wigmore criticized it and argued that the greatest part of the community's industrial, commercial, and financial activity functions on a solid basis of fact determined without any formal rules of proof.[231] The analogy does not seem entirely sound. A businessman commonly makes his judgments for his own purposes; he does not judge between others and impose sanctions. If he commonly did, those subjected to his judgments might quite likely seek means of insuring that the judgments were founded on at least a residuum of solid evidence. Then there would be raised, as in administrative law, the issue as to what is solid evidence.

Professor Davis also vigorously criticizes the residuum rule.[232] He states that the rule requires a reviewing court to set aside an administrative finding unless it is supported by evidence admissible in a jury trial.[233] He takes the position that the reviewing court should be allowed to exercise discretion in determining in the light of the circumstances

[230] *Id.* at 440, 113 N.E. at 509.
[231] 1 WIGMORE § 4*b*, at 42.
[232] 2 DAVIS § 14.10.
[233] *Id.* at 291-92.

of each case whether the particular evidence is reliable even though it would be excluded in a jury case. He holds that perhaps the strongest reason against the residuum rule is lack of correlation between reliability of evidence and the exclusionary rules.[234] He makes the point that the type of administrative determination should, among other factors, make a difference; tenuous hearsay should not be a basis for revoking a professional license even though it would be deemed enough to support an award of a social security benefit.[235]

The residuum rule was not adopted in the Federal Administrative Procedure Act.[236] Professor Davis finds statements in federal cases for and against the rule, but he concludes that the rule is probably not the law of the federal courts.[237] He finds that some states clearly support the rule, some reject it, and some find ways around it such as stretching exceptions to the hearsay rule.[238]

In North Carolina law the substance of the residuum rule is firmly imbedded.[239] The statutes and cases, reviewed above, requiring that administrative findings be supported by *competent* evidence appear to adopt or go beyond the residuum requirement,[240] and the statutes and cases making the administrative findings conclusive if supported by *any competent* evidence appear to be expressing the residuum rule in other terms.

Professor Davis indicates[241] that in North Carolina the residuum rule is weakened by the holding in *Maley v. Thomasville Furniture Co.*[242] He also says, "[S]ome state courts that have verbally adopted the residu-

[234] *Id.* at 293-95.

[235] *Id.* at 299.

[236] It provides that the reviewing court shall set aside agency action, findings, and conclusions found to be unsupported by substantial evidence. 5 U.S.C. § 706(2)(E) (Supp. V, 1970).

[237] 2 DAVIS § 14.11. *But see* Note, *Administrative Law—Evidence—Hearsay and the Right of Confrontation in Administrative Hearings*, 48 N.C.L. REV. 608, 610 (1970).

[238] 2 DAVIS § 14.12.

[239] In Note, *Administrative Law—Evidence before North Carolina Tribunals*, 19 N.C.L. REV. 568, 582 (1941), the writer states that the North Carolina decisions promise a consistent application of the residuum rule.

[240] Professor Davis cites as a case supporting the residuum rule Plyler v. Charlotte Country Club, 214 N.C. 453, 199 S.E. 622 (1938). 2 DAVIS § 14.12, at 323. That case laid down the competent evidence requirement. Professor Cooper notes that in North Carolina, *citing* N.C. GEN. STAT. § 143-315 (1964), "the test is whether the evidence supporting the administrative findings is 'competent' as well as material and substantial," and he adds, "[T]his arguably imports the legal residuum test." 2 COOPER 732-33.

[241] 2 DAVIS § 14.12, at 322-23.

[242] 214 N.C. 589, 200 S.E. 438 (1939).

um rule permit findings to be based upon circumstantial evidence plus hearsay even when the circumstantial evidence alone probably would not support the findings."[243] For this proposition he cites the *Maley* case. His statement does not seem consistent with the court's own declaration: "But the circumstantial evidence relating to the injury, it seems to us, is of sufficient probative force to sustain the conclusion that deceased was injured by accident arising out of his employment . . . ."[244] The Commission's finding that the injury arose out of the worker's employment was being disputed. The court also said, "The decisions [North Carolina decisions] substantially recognize a modification of the strict requirements of judicial proof, to the extent that the findings and award will not be disturbed because of the presence in the case of hearsay testimony when there is other competent evidence, of sufficient probative force, upon which to base the findings."[245] This sounds more like an affirmation of the residuum rule than a weakening of it. The case does not appear to have made inroads on the residuum rule in North Carolina.

The 1967 Act, as to the agencies to which it applies, appears largely to eliminate any need for the residuum rule since nothing but competent evidence is admissible by the agencies in the first place.

I. *Jurisdictional Fact*

A controversial exception to the rule that administrative findings of fact, if supported by the required evidence, are conclusive on judicial review is made in the case of jurisdictional facts. In the leading case of *Crowell v. Benson*,[246] an award of compensation was made under the Longshoremen's and Harbor Workers' Compensation Act in favor of one Knudsen and against Benson. A deputy commissioner found that the claimant was injured while in the employment of Benson and while performing service upon the navigable waters of the United States. The Court reasoned that finality may be given the findings of the deputy, supported by evidence and within the scope of his authority, concerning the circumstances, cause, nature, extent, and consequences of the injury. But the Court further reasoned that where determinations of fact are jurisdictional in the sense that their existence is a condition precedent to the operation of the statutory scheme, an administrative agency cannot deter-

[243] 2 DAVIS § 14.12, at 313-14.
[244] 214 N.C. at 596, 200 S.E. at 442.
[245] *Id.* at 595, 200 S.E. at 442.
[246] 285 U.S. 22 (1932).

mine such facts with finality. The Court held that the reviewing court is to determine the jurisdictional facts by a hearing de novo[247] and that the existence of the "relation of master and servant" and the occurrence of the injury on the navigable waters of the United States are jurisdictional facts.

The holding has been criticized on the ground that ascertainment of what is or is not a jurisdictional fact is often difficult or impossible.[248] It is true that the basis for an award without fault of the defendant is the employer-employee relationship, but it is also required that the injury arise out of the employment—that is, be caused by it. It is not apparent why the one fact should be jurisdictional while the other is not. Justice Frankfurter, in a later concurring opinion, referred to "the casuistic difficulties spawned by the doctrine of 'jurisdictional fact.'" He added, "In view of the criticism which that doctrine, as sponsored by *Crowell v. Benson* . . . brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose."[249] It is said that the doctrine of *Crowell* is probably no longer law and that most state courts reject it.[250]

Nevertheless, a distinction in the case of jurisdictional facts is now firmly imbedded in North Carolina decisions. The supreme court has held in workmen's compensation cases that the existence of the employer-employee relation,[251] the requisite number of employees,[252] and the residence of the employee[253] are jurisdictional issues. The court has also held that whether the employer was engaged in sawing and logging less than sixty days during a period of six months[254] is jurisdictional. In *Askew v. Leonard Tire Co.*,[255] the court said that in some cases the question as to the employer-employee relationship had not been expressly presented as jurisdictional and that the court in those cases, perhaps unmindful of the jurisdictional nature of the question, had applied the rule that the Commission's findings of fact are conclusive on appeal when supported by

[247] The hearing de novo aspect of this requirement is discussed by Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223 (1968).
[248] 2 DAVIS § 16.08; 4 *Id.* § 29.08.
[249] Estep v. United States, 327 U.S. 114, 142 (1946).
[250] 4 DAVIS § 29.08.
[251] Askew v. Leonard Tire Co., 264 N.C. 168, 141 S.E.2d 280 (1965).
[252] Aycock v. Cooper, 202 N.C. 500, 163 S.E. 569 (1932).
[253] Aylor v. Barnes, 242 N.C. 223, 87 S.E.2d 269 (1955).
[254] Burns v. Riddle, 265 N.C. 705, 144 S.E.2d 847 (1965).
[255] 264 N.C. 168, 141 S.E.2d 280 (1965).

competent evidence, which, said the court, is the rule as to findings of non-jurisdictional facts.[256] The court cited cases in which the judge on review made independent findings of jurisdictional facts, and the supreme court approved.[257] The court went on to declare to be settled law the rule that the superior court has both the power and the duty to consider all the evidence in the record and find therefrom the jurisdictional facts without regard to the Commission's finding of such facts. The latter is not conclusive even though supported by competent evidence.[258]

J. *Constitutional Fact*

Another controversial exception to the rule that administrative findings of fact, if supported by the required evidence, are conclusive on judical review is the doctrine of independent judicial determination of constitutional facts, which are facts on which constitutionality of a decision depends.[259] The doctrine of constitutional facts has been extensively dis-

[256] Included in the cases cited by the court for its statement are Hawes v. Mutual Benefit Health & Accident Ass'n, 243 N.C. 62, 89 S.E.2d 739 (1955); Hinkle v. City of Lexington, 239 N.C. 105, 79 S.E.2d 220 (1953). Professor Davis includes one North Carolina case, Scott v. Waccamaw Lumber Co., 232 N.C. 162, 59 S.E.2d 425 (1950), in listing state courts which have used the substantial evidence (actually in *Waccamaw* the competent evidence) rule on questions concerning the existence of the employer-employee relation. He includes none of the North Carolina cases upholding the jurisdictional fact doctrine as to the employer-employee relation. 4 DAVIS § 29.08, at n.42. In Note, *Workmen's Compensation—Analysis of "Jurisdictional Fact" Review by Superior Courts*, 37 N.C.L. REV. 219 (1959), North Carolina cases on the jurisdictional fact rule are discussed, and the rule is criticized.

[257] The cases cited include Richards v. Nationwide Homes, 263 N.C. 295, 139 S.E.2d 645 (1965) (The parties stipulated that the superior court judge might find the facts, but the opinion of the supreme court did not rely on the stipulation.); Aycock v. Cooper, 202 N.C. 500, 163 S.E. 569 (1932).

[258] The court in *Askew* formulated rules concerning when the reviewing court must make its own findings of jurisdictional fact and when it will be deemed to have adopted the Commission's findings thereon. The decision is discussed by Hanft, *Administrative Law, North Carolina Case Law*, 44 N.C.L. REV. 889, 892-96 (1966).

[259] In Crowell v. Benson, 285 U.S. 22 (1932), the Court put the independent judicial determination of jurisdictional facts on a constitutional fact basis. The Court said:

> If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault on his part, to the liability which the statute creates.

285 U.S. at 56. The Court further said, "We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue [jurisdiction] upon its own record and the facts elicited before it." 285 U.S. at 64.

cussed in recent articles by Professor Strong[260] and will not be re-examined here.

IV. Conclusions and Prospects for Improvement

The North Carolina statutes and decisions concerning evidence before administrative agencies in the adjudication of cases contain wide variations in provisions, holdings, and statements concerning different agencies, and sometimes the same agency, often with no apparent justification for the differences. Of course, the kinds of agencies and the types of their adjudications also vary widely, but this fact has not precluded the value of administrative procedure acts applicable to the agencies generally. The General Statutes Commission of North Carolina has at work a Drafting Committee on Administrative Procedure composed of experts in the field charged with the task of studying proposals for a State Administrative Procedure Act.[261] If the Committee submits a draft of such an act to the Commission, the latter, after detailed consideration, may decide to submit such legislation to the General Assembly.[262]

Among matters needing consideration are the following: First, what evidence may an administrative agency receive in an adjudicatory proceeding? Second, on judicial review is the agency to be reversed for receiving inadmissible evidence? Third, on what evidence may the agency make its findings and decision? Fourth, on judicial review what evidence will support the findings and determination of the agency?

With reference to what evidence an administrative agency may receive, the 1967 Act is at one extreme. The Act's requirement that the administrative agencies subject to it exclude incompetent and hearsay evidence imposes a requirement which agencies not manned by lawyers are ill adapted to fulfill. It is an odd feature of the Act that three named agencies excluded from its coverage are probably better qualified to observe its requirements than are many agencies to which it applies. It is difficult to envisage a board manned by dentists[263] or barbers[264] ruling on the competence of evidence. The 1967 Act should be replaced.

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[260] Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C.L. Rev. 311 (1969); Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. Rev. 223 (1968).

[261] The General Statutes Comm'n, Biennial Report to the General Assembly of North Carolina 3-4 (1971).

[262] The Commission's procedure in formulating such major legislation is discussed by Hanft, *The North Carolina General Statutes Commission*, 46 N.C.L. Rev. 469 (1968).

[263] N.C. Gen. Stat. § 90-22(b) (1965).

[264] N.C. Gen. Stat. § 86-6 (1965).

At the other extreme is the view that an administrative agency should be permitted to receive any evidence so long as its findings and determination are supported by prescribed evidence. An argument against this view is that if the agency receives evidence deemed not of the kind required to support its findings and determination, it may be influenced by that evidence to make a determination it would not have made on the evidence received of the prescribed kind.

Some middle ground—such as the requirement that the evidence received be "reliable, probative, and substantial"—can of course be chosen. These terms are more likely to be within the grasp of the members of the agencies.

If an agency receives evidence not of a prescribed kind, the view that the findings and determination will be upheld on judicial review if there is sufficient supporting evidence of a required kind seems sound, but the presence of the illicit evidence may well lead the court to be more exacting with reference to the supporting evidence.

As to a provision stating to the agencies the evidence on which they are to act, the possibilities again are varied. The North Carolina Public Utilities Act requirement of "competent material and substantial evidence"[265] is strict, and if applied to state agencies generally, it would oblige them to know the rules as to the competence of evidence. One alternative is the Federal Administrative Procedure Act requirement of "reliable, probative, and substantial evidence."[266] Whatever the test, the whole record rule should be included.

As brought out in this article, there is a wide variety of North Carolina statutory provisions prescribing the kind of evidence required to support on judicial review the findings and determinations of agencies. Additional possibilities are the Federal Administrative Procedure Act provision for setting aside agency action, findings, and conclusions found to be "unsupported by substantial evidence"[267] and the Revised Model State Administrative Procedure Act provision for reversing or modifying the decision when the administrative findings, inferences, conclusions, or decisions are "clearly erroneous in view of the reliable, probative, and substantial evidence."[268] Again the whole record rule should be included in the test.

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[265] N.C. GEN. STAT. § 62-65(a) (1965).
[266] 5 U.S.C. § 556(d) (Supp. V, 1970).
[267] 5 U.S.C. § 706(2)(E) (Supp. V, 1970).
[268] REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(g)(5) (1961).

Whatever the formula for judicial review of the evidence may be, the words of Justice Frankfurter will furnish its setting. "[T]he precise way in which courts interfere with agency findings cannot be imprisoned within any form of words . . . ."[269]

The provision is discussed in 2 COOPER 724-30 and criticized by K. DAVIS, ADMINISTRATIVE LAW, CASES—TEXT—PROBLEMS 587-88 (1965).

[269] Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951). A similar view is elaborated by 4 DAVIS § 29.02.