PUBLIC UTILITIES—VALUATION—JUDICIAL REVIEW OF FINDINGS OF PUBLIC SERVICE COMMISSIONS.—The Public Service Commission of Maryland, after revaluation of the Chesapeake and Potomac Telephone Company's property, ordered a reduction of rates. The rate base used by the Commission was ascertained by "trending" the 1923 valuation, the book cost of annual additions, and the depreciation to dollar values as of 1932 by the use of "translators" derived from a composite of price index numbers. The District Court set aside the rates and entered a valuation of its own based largely on book historical cost.[1] On appeal by the Commission the Supreme Court disapproved the lower court's valuation and its action in entering it, but affirmed its order setting aside the Commission rates, because the method of the Commission in arriving at its rate base was "inapt," "inappropriate," arbitrary, and fundamentally erroneous. West v. Chesapeake and Potomac Telephone Co. (U. S. Sup. Ct. 1935) 55 Sup. Ct. Rep. 894.

The emphasis of the Court in setting aside the rates is on the erroneous method used in fixing them and not on their confiscatory character. The case raises two problems: a) the extent of judicial review over the procedure of public utility commissions in arriving at valuation conclusions; b) administrative method as a constitutional issue, apart from confiscation.

There is no doubt that judicial review of regulatory orders extends to the procedure of regulatory agencies in making the orders.[2] They have been invalidated by the courts for absence, inadequacy, or manifest unfairness of hearing;[3] for entrance without evidence;[4] because matters of fact were considered which were not in the record;[5] because the Commission considered facts which could not legally influence its judgment;[6] because the evidence, as a matter of law, failed to support the findings;[7] because the Commission

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[1] Chesapeake and Potomac Telephone Co. v. West, et al. (Md. Dist. Ct., 1934) 7 Fed. Supp. 214. See also the Commission's valuation of the same Company in 1923, Chesapeake and P. Telephone Co. v. Whitman et al. (1925) 3 Fed. Supp. 938.

[2] Interstate Commerce Comm. v. Ill. Cent. R. R. (1909). 215 U. S. 450, 30 Sup. Ct. 155, 54 L. Ed. 280; Interstate Com. Comm. v. Union Pac. Ry. (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308; Interstate Com. Comm. v. Mo. Pac. Ry. (1910) 216 U. S. 544, 30 Sup. Ct. 417, 54 L. Ed. 609; Railroad Comm. v. Cumberland Tel. & Tel. Co. (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; Cedar Rapid Gas Co. v. Cedar Rapids (1911) 223 U. S. 655, 32 Sup. Ct. 389, 56 L. Ed. 594; Kansas City So. Ry. v. U. S. (1913) 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. N. S. 1.

[3] Interstate Com. Comm. v. L. & N. Ry. (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; People ex rel. N. Y. Gas Co. v. McCall (1917) 245 U. S. 344, 38 Sup. Ct. 122, 62 L. Ed. 337; A. T. & S. F. Ry. v. U. S. (1931) 284 U. S. 248, 52 Sup. Ct. 146, 76 L. Ed. 273.

[4] Simpson v. Shepard (Minnesota Rate Cases) (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511; B. & O. R. R. v. U. S. (1924) 264 U. S. 258, 44 Sup. Ct. 317, 68 L. Ed. 667; Interstate Com. Comm. v. Union P. Ry., supra, note 2.

[5] United States v. Abilene & So. Ry. (1924) 265 U. S. 288, 44 Sup. Ct. 565, 67 L. Ed. 1023; I. C. C. v. L. & N. Ry., supra, note 3.

[6] Southern Pac. Ry. v. I. C. C. (1911) 219 U. S. 445, 31 Sup. Ct. 288, 55 L. Ed. 287; Florida E. Ry. v. U. S. (1914) 234 U. S. 167, 34 Sup. Ct.

refused to consider evidence which was introduced,[8] or which, as matter of law, it was bound to consider.[9] The judicial review asserted in these cases has to do essentially with "due process" in the purely procedural sense. This is obvious in the cases where orders not involving rates have been scrutinized solely in what may be called their adjectival aspects.[10] But when the court reviews the "reasonableness" of rates or the "fairness" of valuations, inquiring whether evidence supports a finding or must be considered "as a matter of law," it inevitably suggests a review of administrative method in a more substantive sense.[11]

The leading case[12] seems to hold that rates may be set aside as well for arbitrary and unreasonable action in fixing them as for confiscatory effect. And Cardozo, J., recently observed that "they may be challenged for other reasons (than confiscatory effect) where they are without evidence supporting them and are merely arbitrary edicts."[13] It is believed that the true meaning of such a statement is that administrative method is reviewable only to determine whether it conforms to the familiar standards of due process, e. g., notice, opportunity to enter evidence and examine opposing evidence, judgment according to the evidence. And the scope of this procedural review is not enlarged when it is incident to the issue of confiscation.[14] In the cases principally relied on in the instant case the doctrine is stated as follows: "When rates found by a regulatory body to be compensatory are attacked as being confiscatory, the courts may inquire into the method by which its conclusion was reached."[15] The cases announcing this doctrine so broadly did not involve valuation and they restrict their review to the accepted strict procedural elements.[16] Since then the Court, treating

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867, 58 L. Ed. 1267; Ann Arbor R. Co. v. U. S. (1930) 281 U. S. 658, 50 Sup. Ct. 444, 74 L. Ed. 1098.

[7] Atlantic C. Ry. v. N. C. Corp. Comm. (1906) 206 U. S. 20, 27 Sup. Ct. 585, 51 L. Ed. 942; So. Pac. Ry. v. I. C. C., supra, note 6.

[8] Texas & Pac. Ry. v. I. C. C. (1895) 163 U. S. 197, 16 Sup. Ct. 666, 40 L. Ed. 940; B. & O. Ry. v. U. S., supra, note 4.

[9] St. Louis & O'Fallon R. v. U. S. (1929) 279 U. S. 462, 49 Sup. Ct. 384, 73 L. Ed. 798; Missouri ex rel. Bell Tel. Co. v. Public Serv. Comm. (1922) 262 U. S. 276, 43 Sup. Ct. 544, 67 L. Ed. 981, 31 A. L. R. 807.

[10] Especially in the Abilene Case, supra, note 5, and the so-called Chicago Junction Case (B. & O. R. v. U. S.) supra, note 4, and People ex rel. v. McCall, supra, note 3.

[11] See Brandeis, J., dissenting in Missouri ex rel. v. Public Serv. Comm., supra, note 9, and Sharfman, *The Interstate Commerce Commission* (New York, 1931) pp. 417-452, especially at p. 452.

[12] Interstate Com. Comm. v. Union Pac. Ry., supra, note 2.

[13] Norwegian Nitrogen Prod. Co. v. U. S. (1933) 288 U. S. 294, 53 Sup. Ct. 350, 77 L. Ed. 796.

[14] Barnes, "Federal Courts and State Regulation of Utility Rates," 43 Yale Law Journal 417.

[15] Northern Pac. Ry. v. Dept. of Public Works (1925) 268 U. S. 39, 45 Sup. Ct. 412, 69 L. Ed. 836, l. c. 268 U. S. 46; Chicago, Mil. & St. P. Ry. v. Pub. Utility Comm. of Idaho (1927) 274 U. S. 344, 47 Sup. Ct. 604, 71 L. Ed. 1085, l. c. 274 U. S. 351.

[16] The cases in note 15 were apparently the first to state the doctrine just this way, but it is believed that the aim was merely to crystallize principles

the valuation question in a most clarifying opinion, has pointed out that the sole constitutional issue is whether the rates fixed are confiscatory and the legislative (administrative) method is relevant only as it "may have a definite bearing upon the validity of the result reached."[17] It is the valuation cases that have opened the complex question of "fair value"[18] to the independent judgment of the courts.[19] It is in these cases that the Supreme Court has seemed, more than once, to have found rates confiscatory simply because it disapproved the method of valuation used by the commission.[20] Yet the courts have consistently denied, as did the District Court in the present case, that it was within their "limited constitutional function . . . to reject the valuation merely because of an erroneous method."[21] The Supreme Court has said repeatedly that it does not sit as a board of revision, to reweigh evidence or to enforce its notions of wisdom or expediency.[22] It has expressly avowed that "it is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached."[23] Unfortunately, the Court has not always kept so clear the distinction between its own functions and those of the administrative agencies whose orders it reviews.[24]

The present case, as well as many recent valuation cases, illustrates a current tendency to extend judical review quite beyond the above salutary limitation. The most doubtful eventuality of opening to judicial review the

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previously announced and not to propose a new reach of judicial review into administrative method.

[17] Los Angeles Gas and Elect. Corp. v. R. R. Comm. of Calif. (1933) 289 U. S. 287, 53 Sup. Ct. 637, 77 L. Ed. 1180. See Barnes' article in 43 Yale L. J. 417, cited note 14 supra, which is largely a discussion of this case and the problems suggested by it.

[18] Smyth v. Ames (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; Willcox v. Consolidated Gas Co. (1908) 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382. See also Simpson v. Shepard, supra, note 4.

[19] Ohio Valley Water Co. v. Ben Avon Borough (1920) 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908. For discussion of problems in judicial review raised by this case see Note (1933) 31 Michigan Law Review 1169.

[20] Note especially Bluefield Water Co. v. Public Serv. Comm. of West Va. (1922) 262 U. S. 679, 43 Sup. Ct. 675, 67 L. Ed. 1176, where valuation was set aside for failure to give "proper weight" to evidence of reproduction cost. See also the opinion and the dissent in McCardle v. Indianapolis Water Co. (1926) 272 U. S. 400, 47 Sup. Ct. 144, 71 L. Ed. 316, especially note 5 at 272 U. S. 422. Cf. statements in all these cases that no one standard of valuation is conclusive.

[21] Chesapeake and Potomac Tel. Co. v. West, supra, note 1.

[22] See divers citations supra: I. C. C. v. Ill. Cent. R., note 2; I. C. C. v. L. & N. Ry., note 3; U. S. v. Abilene R., note 5; Mo. Pac. Ry. v. Dept. of Pub. Works, note 15; Los Angeles Gas & Elect. Co. v. R. R. Comm., note 16. See Brandeis', J., lengthy and able dissent in St. L. & O'Fallon Ry. Case, supra, note 9.

[23] San Diego Land and Town Co. v. Jasper (1903) 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892, per Holmes, J.

[24] United Railways Co. v. West (1929) 280 U. S. 234, 50 Sup. Ct. 123, 74 L. Ed. 390. See Merrill, "The Distinction between Non-Confiscatory Rates and Just and Reasonable Rates" (1929) 14 Cornell Law Quarterly 447.

methods of regulatory agencies in reaching their conclusions as well as the legal sufficiency of their procedure is that valuations will be found confiscatory, not on economic considerations, but solely because the court disapproves the commission's method. That the administrative method may become *the* constitutional issue is implicit in the majority opinion in the instant case when it says: "the entire method of the Commission was erroneous and its use *necessarily* involved unjust and inaccurate results." This is arguable to say the least, and it is the real basis of the decision. The review of commission action here assumed is definitely beyond both the strict procedural limits and the issue of confiscation.[25] It goes even further than the valuation cases where commissions have been reversed for failing to consider evidence which the Court held them bound to consider.[26] It is quite contrary in spirit to other recent cases[27] which have given the methods and findings of expert administrative agencies the respect which precedent[28] and sound judicial principles enjoin upon the court. The Court has condemned a conscientious and expert attempt at valuation without definitely impugning the result on any other ground. Again the law seems to have thrown into the economic perplexities of utility regulatory agencies another element of confusion and unpredictability.

C. M. W. '36.

TAXATION—MISSOURI INHERITANCE TAX—DEDUCTION OF FEDERAL TAX.—When an estate is appraised for the purpose of assessing the state inheritance tax should the federal estate tax assessment be deducted from the value of the estate? This question has recently been answered in the affirmative by the Supreme Court of Missouri in the case of *In re Rosing's Estate.*[1] In this case the court sustained the contention of the executor that such a deduction should be made, holding that Missouri's tax was an inheritance tax and not an estate tax.

The term "inheritance tax" is often used by the courts to indicate any kind of a death duty. Strictly speaking, an inheritance tax is a tax on the right of succession, the right of the heirs, devisees, or heirs to take an interest in property upon the death of the owner. Another kind of death duty is an estate tax, a tax on the right of the owner to transfer property at his death either by will or intestacy. The problem raised in the case of *In re Rosing's Estate* may be settled only after it is decided whether the federal and state duties are inheritance or estate taxes.

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[25] Suggested in notes 3 to 9 inclusive.

[26] Referred to in notes 9 and 18.

[27] Los Angeles Gas & Elect. Corp. v. R. R. Comm., supra, note 17; Central Kentucky Gas Co. v. R. R. Comm. (1933) 290 U. S. 264, 54 Sup. Ct. 154, 78 L. Ed. 307; Clark's Ferry Bridge Co. v. Pub. Service Comm. (1934) 291 U. S. 227, 54 Sup. Ct. 427, 78 L. Ed. 767; Dayton Power and Light Co. v. Pub. Utilities Comm. (1934) 292 U. S. 310, 54 Sup. Ct. 647, 78 L. Ed. 1267.

[28] Illinois Cent. R. v. I. C. C. (1906) 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128.

[1] (1935) Mo., 85 S. W. (2d) 495.