COMMENT ON RECENT DECISIONS

ADMINISTRATIVE LAW—EXTENT OF JUDICIAL REVIEW ON ISSUE OF CONFISCATION—[United States].—The Texas Railroad Commission promulgated a proration order for restricting the production of petroleum in the east Texas oil bed. Each well was to be allowed to produce 2.32 percent of its "hourly potential" except that any well was allowed to produce up to twenty barrels a day. The result was that 451 wells were permitted to operate at capacity, 19,032 were allowed twenty barrels a day, and the other 6,325 wells, all capable of producing between 865 and 1100 barrels *an hour,* were forced to cut down to between twenty-two and twenty-five barrels a day. Complainant's wells were all in the latter group. They were all in the most desirable section and among the most valuable wells of the oil bed. Although many tracts were more closely drilled than complainant's, complainant was refused permission to drill more wells. Suit was brought in the federal district court to enjoin enforcement on the ground that the order was confiscatory and violative of due process in that it disregarded complainant's property rights to the oil in place under its land and permitted it to be drained off through neighboring tracts. The district court granted a trial *de novo* and set aside the order. *Held,* that the federal court should not supplant the commission's judgment even if convincing proof were presented that a different order would be better. *Railroad Commission v. Rowan & Nichols Oil Co.*[1]

The rule applied in public utility rate order cases has been that when the rates were alleged to be confiscatory the court should make an independent determination of all facts relevant to the issue of confiscation, especially the valuation of the property.[2] This rule is based on the proposition that rate making is a legislative act[3] and that due process requires an independent judicial determination of all questions of fact and law bearing

1. (1940) 310 U. S. 573. See also Railroad Comm. v. Rowan and Nichols Oil Co. (1941) 61 S. Ct. 343, involving a subsequent order which the Supreme Court upheld for the same reasons.

2. Ohio Valley Water Co. v. Ben Avon Borough (1920) 253 U. S. 287; St. Joseph Stockyards Co. v. United States (1936) 298 U. S. 38; Bluefield Water Co. v. Public Service Comm. (1923) 262 U. S. 679. In Baltimore and Ohio R. R. v. United States (1936) 298 U. S. 349, it was indicated that this review might be not merely a consideration of the record but a trial *de novo* where the court felt it desirable to receive additional evidence. Cf. St. Joseph Stockyards Co. v. United States (1936) 298 U. S. 38, 53 et seq. The rule has been limited somewhat in its application by disregard of the issue of confiscation where a "taking" of physical property is not involved, as, for example, where a rate order limits the return for personal services. Acker v. United States (1936) 298 U. S. 426. A trial *de novo* of the issue of citizenship in a deportation case was had in Ng Fung Ho v. White (1922) 259 U. S. 276, on the ground that the constitutional right to liberty was at stake. Brandeis, J., who wrote the opinion, later distinguished this case, however, upon the ground that the *habeas corpus* procedure there employed left no alternative. See his dissent in Crowell v. Benson (1932) 285 U. S. 22, 90.

3. Prentis v. Atlantic Coast Line Co. (1908) 211 U. S. 210.

upon constitutionality.[4] The result has been severely criticized. It has been said that there is no reason for distinguishing for purposes of review between administrative determinations of "constitutional" facts and determinations of other facts upon which, concededly, the administrative findings are final if supported by substantial evidence.[5] The point has been made that rate making can no longer be considered a legislative process, but that for purposes of review it is more nearly a judicial one[6]—that the litigant is accorded a complete hearing on all issues of fact before the commission and has no right to another before the courts.[7] The courts, moreover, have set aside orders because of improper administrative methods of computation of the rates without regard to the propriety of the rates themselves and so have failed to follow the reasoning of the *Ben Avon* and *St. Joseph Stockyards* cases;[8] for if rate making is legislative, the result and not the method used in fixing the rates would present the justiciable issue.

Much of the criticism of the rule as to review of constitutional facts has centered around its practical effects. Reviewing findings of fact forces courts to duplicate the work of the commissions, to weigh evidence, and in some cases to hear testimony.[9] The voluminous records and technical nature

4. Ohio Valley Water Co. v. Ben Avon Borough (1920) 253 U. S. 287, 289; St. Joseph Stockyards Co. v. United States (1936) 298 U. S. 38, 51. It has been suggested that this rule grew up when rates were established by the legislature or a commission without a formal hearing, and review was available solely in non-statutory proceedings without an administrative record being brought before the court. Beutel, Valuation as a Requirement of Due Process of Law in Rate Cases (1930) 43 Harv. L. Rev. 1249, 1264; Note, A Positive Suggestion for a Change in the Rate Making Process (1938) 33 Ill. L. Rev. 325, 328.

5. Interstate Commerce Comm. v. Illinois Central R. R. (1910) 215 U. S. 452, 470; Interstate Commerce Comm. v. Union Pac. R. R. (1912) 222 U. S. 541, 547; Manufacturers Ry. v. United States (1918) 246 U. S. 457, 488. See Landis, Administrative Policies and the Courts (1938) 47 Yale L. J. 519, 520; Freund, The Right to a Judicial Review in Rate Controversies (1921) 27 W. Va. L. Q. 207; Brown, The Functions of Courts and Commissions in Public Utility Rate Regulation (1924) 38 Harv. L. Rev. 141; Brandeis, J., dissenting on this point in St. Joseph Stockyards Co. v. United States (1936) 398 U. S. 38, 76.

6. Cf. United States v. Chicago, M., St. P., & Pac. R. R. (1935) 294 U. S. 499.

7. Brown, The Functions of Courts and Commissions in Public Utility Rate Regulations (1924) 38 Harv. L. Rev. 141, 148; Beutel, Valuation as a Requirement of Due Process of Law in Rate Cases (1930) 43 Harv. L. Rev. 1249; Note, A Positive Suggestion for a Change in the Rate Making Process (1938) 33 Ill. L. Rev. 325; Brandeis, J., in St. Joseph Stockyards Co. v. United States (1936) 298 U. S. 38, 77.

8. Northern Pac. R. R. v. Dept. of Public Works (1925) 268 U. S. 39; Chicago, M., & St. P. R. R. v. Public Utilities Comm. (1927) 274 U. S. 344; West v. Chesapeake and P. Tel. Co. (1935) 295 U. S. 662 (Stone, J., dissenting, p. 680). Contra: Los Angeles Gas & Elec. Corp. v. Railroad Comm. (1933) 289 U. S. 287.

9. Where federal courts review the work of federal agencies, an opportunity to introduce evidence on the issue of confiscation has been granted. Baltimore & Ohio R. R. v. United States (1936) 298 U. S. 349. But Ohio Valley Water Co. v. Ben Avon Borough (1920) 253 U. S. 287, left open the question of the procedure to be followed by state courts in reviewing

of the evidence renders these matters impossible of adequate consideration at the hands of the courts and delays the final effectiveness of the rates so as seriously to cripple the entire process of regulation.[10] The whole result is to take from administrative bodies functions which they have been created to exercise and to place in the courts functions which they have handled only with a great deal of difficulty.[11]

In proration order cases the issue is not valuation of property but the effect of schemes to divide production allowances among producers over a given oil bed. The problem is complex because of the number of interests that must be balanced and presents questions of judgment upon which judicial review can add little to administrative conclusions.[12] The instant case,

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the work of state agencies. The instant case involved a federal court reviewing a state agency; the district court granted a trial *de novo* and heard additional testimony. Rowan & Nichols Oil Co. v. Railroad Comm. (D. C. W. D. Tex. 1939) 28 F. Supp. 131. Whether this was necessary can be questioned. It is a problem whether courts can be confined to facts as presented to them by an administrative agency.

10. In St. Joseph Stockyards Co. v. United States (1936) 298 U. S. 38, six and one-half years elapsed between the time the Secretary of Agriculture started his inquiry into the reasonableness of the rates and the time the Supreme Court upheld the order. The record before the district court contained 1,648 printed pages with 111 exhibits. The total number of pages—briefs, exhibits, and evidence—before the Supreme Court amounted to 3,466. Id. at 84. In the Chicago telephone rates controversy it was eleven years between the time the order was made and the time all appeals were decided and the order became final. The record before the district court covered 3000 pages; that before the Supreme Court, seven large volumes. Id. at 88. In the New York telephone rates controversy, hearings began before the Public Service Commission in 1920 and lasted until 1930. Evidence introduced filled 26,417 pages; there were also 1,043 elaborate exhibits, one alone filling twenty-two volumes. Evidence before the district court on appeal filled 36,893 pages with 3,324 exhibits. Id. at 90. Similar statistics for other cases are set forth in Beutel, Valuation as a Requirement of Due Process of Law in Rate Cases (1930) 43 Harv. L. Rev. 1249. See also Landis, Administrative Policies and the Courts (1938) 47 Yale L. J. 519, 524.

11. See Landis, Administrative Policies and the Courts (1938) 47 Yale L. J. 519, 529; Kearney, The Problem of De Novo Judicial Review of Administrative Action (1939) 14 Notre Dame Lawyer 233, 235. Buchanan, The Ohio Valley Water Company Case and the Valuation of Railroads (1927) 40 Harv. L. Rev. 1033, 1067, has taken a contrary view, preferring, as he says, to put his "faith in the pupils of the school of the Supreme Court rather than in those of the Interstate Commerce Commission." Congressional reaction to the problem is illustrated by the Johnson Act (1934) 48 Stat. 775, 28 U. S. C. A. (Supp. 1940) sec. 41(1), which denies to the federal district courts jurisdiction to enjoin the enforcement of the order of any *state* rate-making body where jurisdiction is based solely on diversity of citizenship or repugnance to the Federal Constitution where the order does not interfere with interstate commerce, "was made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy" is available in the state courts.

12. Factors which are to be taken into account in arriving at a formula for production allowances include the area of the several producers' tracts, the shape of the oil bed, the direction of natural migration of the oil, the character of the soil, and the quantity of the oil under particular tracts. The formula as evolved herein by the Commission was one based on hourly

in refusing a complete review of the issue of confiscation, indicates a drift away from the doctrine of the *Ben Avon* and *St. Joseph Stockyards* cases. It appears that an independent judicial review of even "constitutional facts" will not be granted, at least in certain cases[13]—probably in those where by balancing considerations relating to the nature of the issue involved, the character of the administrative body, the procedure followed, the character of the relevant evidence, and the public need for an immediate decision, the conclusion is reached that justice will be better achieved by giving finality to the administrative finding.[14]

W. B. W.

ADMINISTRATIVE LAW—RES JUDICATA—EFFECT OF JUDICIAL DECISION AGAINST ONE FEDERAL AGENCY ON ADMINISTRATIVE PROCEEDINGS OF ANOTHER—[Federal].—Petitioner, which was engaged in advertising and selling in interstate commerce a vermifuge for poultry, sought review of a cease and desist order of the Federal Trade Commission directed against false and misleading advertising of its "Gizzard Capsules." The order was challenged on the ground that such advertising had been held not false in a libel proceeding brought in a federal court by the United States against certain packages of the same product. *Held:* Since the underlying issue in both actions was the same, the Federal Trade Commission was bound by the court's decision in the previous case and could not decide that petitioner's advertising was false. *George H. Lee Co. v. Federal Trade Commission.*[1]

As ordinarily stated, the rule of *res judicata* is that a right, question, or fact directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, even if the second suit is for a different cause of action.[2] There is privity between officers of the same government

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potential which the petitioner contended ignored several of the above factors. Cf. Ely, The Conservation of Oil (1938) 51 Harv. L. Rev. 1209, 1218. For the background to the problem of state control see Marshall and Meyers, The Legal Planning of Petroleum Production: Two Years of Proration (1933) 42 Yale L. J. 702.

13. The courts will, of course, still accord a review on issues of law and of whether or not the administrative board clearly acted arbitrarily or without substantial evidence to support it. Its procedure will also be strictly reviewed. Morgan v. United States (1936) 298 U. S. 468; Ohio Bell Tel. Co. v. Public Utilities Comm. (1937) 301 U. S. 292; Morgan v. United States (1938) 304 U. S. 1; West Ohio Gas Co. v. Public Utilities Comm. (No. 1) (1935) 294 U. S. 63.

14. See the opinion of Mr. Justice Brandeis in St. Joseph Stockyards Co. v. United States (1936) 298 U. S. 38, 76; Albertsworth, Judicial Review of Administrative Action by the Federal Supreme Court (1921) 35 Harv. L. Rev. 127. Cf. Beutel, Valuation as a Requirement of Due Process of Law in Rate Cases (1930) 43 Harv. L. Rev. 1249; Note (1938) 33 Ill. L. Rev. 325.

1. (C. C. A. 8, 1940) 113 F. (2d) 583.

2. Id. at 586; Southern Pacific R. R. v. United States (1897) 168 U. S. 1, 48; Mitchell v. First Nat'l Bank (1901) 180 U. S. 471, 480, 481. See