

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 cases¹³—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

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

so that judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government.³ The defense of *res judicata* has been allowed in at least one case involving misbranding.⁴ In *George H. Lee Co. v. United States*⁵ the government was held to be estopped from prosecuting a second libel proceeding against a commodity allegedly misbranded under the Insecticide Act of 1910 because of an adverse judgment in a previous libel action charging misbranding of a different lot of the same commodity.⁶

The instant case, holding administrative action barred because of previous adjudication of the issue by a court, suggests the related problem of the finality of administrative decisions.⁷ In connection with the grant of public lands it has been held that the Secretary of the Interior has no authority to annul the action of his predecessor *approving* a grant on the ground that such approval was obtained by fraud, since the fact that the grantee was entitled to the land under the statute was a "quasi-judicial fact" which, when properly established, cannot be attacked collaterally.⁸ But where the act of the Secretary of the Interior involved the *rejection* of an application for a land patent, the issuance of a patent upon rehearing by a successor in office was held proper, since the department retains control over the subject matter until title passes from the govern-

Cromwell v. Sac County (1876) 94 U. S. 351, 353; *United States v. Moser* (1924) 266 U. S. 236, 241; *Tait v. Western Maryland Ry.* (1933) 289 U. S. 620, 623.

3. *Tait v. Western Maryland Ry.* (1933) 289 U. S. 620, 627; *George H. Lee v. Federal Trade Comm.* (C. C. A. 8, 1940). Cf. *Sunshine Anthracite Coal v. Adkins* (1939) 310 U. S. 381, where, in a suit brought by a producer against the Commissioner of Internal Revenue to enjoin a collection of the excise tax imposed by the act on sales of bituminous coal, an order of the National Bituminous Coal Commission denying the producer's claim to exemption from the operation of the Bituminous Coal Act of 1937 was held *res judicata* as to whether appellant's coal was bituminous within the meaning of the Act.

4. Fuchs, *The Formulation and Review of Regulations under the Food, Drug and Cosmetic Act* (1939) 6 *Law and Contemporary Problems* 43, 68.

5. (C. C. A. 9, 1930) 41 F. (2d) 460.

6. Cf. *United States v. Certain Bottles of "Lee's Save the Baby"* (D. C. D. Conn. 1929) 37 F. (2d) 137, where dismissal without trial of two informations charging misbranding under the Food and Drugs Act was held not *res judicata* in a subsequent libel proceeding against another misbranded lot of the same commodity. See also *Aycock v. O'Brien* (C. C. A. 9, 1928) 28 F. (2d) 817, where a judgment on an information charging a corporation with misbranding under the Food and Drug Act was held not *res judicata* in a civil action brought eleven years later by a person succeeding to the interests of the corporation to enjoin enforcement of a fraud order issued by the Postmaster General.

7. See Freund, *Administrative Powers over Persons and Property* (1928) 285-288.

8. *United States v. Minor* (1885) 114 U. S. 233; *Noble v. Union Logging R. R.* (1893) 147 U. S. 165, 173. In the latter case the Court said that the United States can, on established equitable grounds, maintain a bill for the cancellation of an approval of a land grant obtained by fraud.

ment.⁹ On the basis of these cases, Freund concluded that there is an inclination to hold that the government cannot by administrative action rescind decisions it has made in favor of an individual, although it may rescind decisions against him.¹⁰ In a later case, however, it was held that a ruling of the Secretary of the Interior giving certain children of a mixed-blood Indian the right to share in tribal interest annuities, could be reversed eight years later by a succeeding Secretary on the basis of his different interpretation of the statute.¹¹ The Court based its decision on the ground that this ruling was of a "continuing" nature.¹² Again, in *United States v. Stone and Downer Co.*¹³ the question in issue had been decided adversely to the government in a previous case.¹⁴ The Supreme Court held that the decision of the Court of Customs Appeals was not *res judicata* in respect of a subsequent importation by the same person giving rise to the same issues of fact and law.¹⁵

Traditional views of *res judicata* support the decision in the instant case; but the courts seem to recognize the difficulties which the normal application of the doctrine of *res judicata* would impose on administrative bodies charged with continuing supervisory duties.¹⁶ The result in each case should depend upon a careful balancing of the public interest in effective administration and the individual's interest in being free from repeated litigation of a single issue.

A. M. E.

CONSTITUTIONAL LAW—UNREASONABLE SEARCH AND SEIZURE—ADMINISTRATIVE INVESTIGATIONS—SUBPOENA DUCES TECUM — [Federal].—Respondent, a corporation engaged in a general merchandising business throughout the United States, was an employer in interstate commerce within the terms of the Fair Labor Standards Act of 1938.¹ Petitioner, as administrator of the Wages and Hours Division, issued in the course of an investigation a *subpoena duces tecum* ordering the production of specified records²

9. *Beley v. Naphtaly* (1898) 169 U. S. 353, 364; *West v. Standard Oil Co.* (1929) 278 U. S. 200, 221. The Secretary of the Interior determined as a proposition of law that because of conceded facts a company's title to certain land had become unassailable. It was held that he acted without authority and that the order based on his ruling did not remove the land from the jurisdiction of the department.

10. Freund, *Administrative Powers over Persons and Property* (1928) 286.

11. *Wilbur v. United States* (1930) 281 U. S. 206.

12. *Id.* at 217.

13. (1927) 274 U. S. 225.

14. *Stone and Downer Co. v. United States* (1923) 12 Ct. Cust. App. 62.

15. *United States v. Stone and Downer Co.* (1927) 274 U. S. 225, 235.

16. See *id.* at 225, 235-236, for the court's discussion approving the wisdom of the Court of Custom Appeals' practice as to *res judicata*.

1. (1938) 52 Stat. 1060, c. 676, 29 U. S. C. A. (Supp. 1940) secs. 201-219.

2. The *subpoena duces tecum* was issued to require the respondent to produce (1) the records of a six months period showing wages paid to, and time clock cards of, employees in the mail order branch at Kansas City,