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THE RIGHT TO A JUDICIAL REVIEW IN RATE CONTROVERSIES.*

By Ernst Freund.**

In the case of *Ohio Valley Water Co. v. Ben Avon Borough*, decided June 1, 1920,¹ the company appealed from a commission ruling on the ground that the valuation by the commission of the company's property made the rates based upon it in effect confiscatory. The reviewing court corrected the valuation. The supreme court of the state² held that the reviewing court in exercising an independent judgment upon the proper valuation to be placed upon various items of the property had exceeded its statutory jurisdiction since there was competent evidence to support the commission valuation. The Supreme Court of the United States holds that if the statute did not permit such independent judicial re-examination, it denied due process.

Three judges dissent on two grounds: The one, that there was besides the appeal, a right to an injunction, to which the supposed statutory limitation upon the jurisdiction of the appellate court would not have applied, so that in effect the issue of denial of due process was not presented. This point may be passed over. The other, that due process was not denied if the court inquired whether there was competent evidence to support the commission valuation, even though the commission judgment on the basis of

* Professor of Law, University of Chicago.

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¹ 40 Sup. Ct. Rep. 527 (1920).

² *Borough of Ben Avon v. Ohio Valley Water Co.*, 260 Pa. 289, 103 Atl. 744 (1918).

that evidence was accepted as final. Here the majority and minority views of due process differ.

What does the requirement of due process mean in rate regulation? The Supreme Court has never given a clear answer to the question. We start with the case of *Chicago, Milwaukee & St. Paul R. Co. v. Minnesota*.³ The statute permitted a railroad commission to fix rates, making full provision for hearings before the commission. A rate having been made and disobeyed, the commission obtained a *mandamus* against the railroad company, the court treating the rate as conclusive. In this the Supreme Court of the United States found a denial of due process. But it did so on the ground that the action of the commission was without any semblance of due process. It assumed that the state court had so construed the state statute concerning the powers and the action of the commission; and in a subsequent case⁴ declined any responsibility for this construction. The fact that the full provisions for a hearing before the commission were entirely ignored, deprives the decision of any value, although if the facts are not closely scrutinized, it appears to be a strong authority for the inconclusiveness of commission rates.

We pass to the Interstate Commerce Act. Ten years after its enactment, in 1897, the Supreme Court decided that upon an application by the Interstate Commerce Commission to enforce reasonable rates, the court, dealing with the matter as a court of equity, would make an independent examination and determination of the question of reasonableness.⁵ Thereupon followed an agitation for the revision of the law which resulted in the rate act of 1906.

The question of judicial review was much discussed. There was a controversy as to the power of Congress, a good deal was said about the difference between jurisdiction and judicial power. Some who listened to the discussion in the Senate thought there had not been a constitutional debate of equally high order since the days of Webster and Haynes; others thought the argument was confused and confusing. In any event the result was a straddle. The provision dealing directly with judicial review is a model of ambiguity: upon application by the commission to the court to en-

³ 134 U. S. 418 (1890).

⁴ *San Diego Land etc. Co. v. National City*, 174 U. S. 739, 749 (1898).

⁵ *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144 (1897).

force its order the court is to prosecute such inquiries as it shall deem needful; if, upon such hearing as it may determine to be necessary, it appears that the order was regularly made and duly served and that the carrier is in disobedience, the court shall enforce obedience, *etc.* What does "regularly made" mean? No one knows. The question has not been cleared up because this provision is in practice not applied.

All judicial review takes place in injunction proceedings brought by the carrier against the commission to which the act of 1906 gives an indirect and casual recognition. It speaks of the venue of suits brought against the commission to enjoin any order, and also provides that no injunction restraining the enforcement of an order of the commission shall be granted except upon five days' notice. The injunction being thus mentioned only incidentally, the scope of judicial review in connection with it is likewise left to implication.

The Supreme Court, in *Interstate Commerce Commission v. Illinois Central R. Co.*,⁶ has stated that in determining whether a commission order will be set aside the court must consider:

- a. All relevant questions of constitutional power and right;
- b. Whether the administrative order is within the scope of the delegated authority under which it purports to have been made;
- c. Whether, while in form within the delegated power, it is not in substance covered by it because the authority is unreasonably exercised.

The principle was stated in different form in *Interstate Commerce Commission v. Union Pacific R. Co.*,⁷ as follows: The orders of the Commission are final unless,

1. Beyond the power which it could constitutionally exercise;
2. Beyond its statutory power;
3. Based upon a mistake of law.

The court again asserts its power to control an unreasonable exercise of power, and adds more specifically that an order may be set aside if contrary to or unsupported by evidence, and if the rate is so low as to be confiscatory.

The two statements may be understood as at least fully recognizing the familiar grounds on which judicial control over administrative determinations is exercised, namely: jurisdictional error, error of law (in which is included a ruling contrary to clear

⁶ 215 U. S. 452 (1909).

⁷ 222 U. S. 541 (1911).

facts), and abuse of discretion. But they go further in asserting a reviewing power for the protection of constitutional rights which includes protection against confiscatory rates. The Ben Avon Case declares judicial control on this last ground essential to due process of law, and therefore to the validity of any state statute.

The majority in the Ben Avon Case hold, if I understand the opinion correctly, that a difference in valuation which makes the difference between a non-confiscatory and a confiscatory rate presents a judicial question. Let us see what this doctrine leads to. Let us assume that the courts hold any rate that leaves less than 7% return confiscatory. A commission values a public utility at \$1,000,000 and makes a rate yielding a return of \$70,000. The utility contends for a valuation of \$1,050,000. Upon that contention it is entitled to the independent opinion of a regular court. Had the court held a 6% return non-confiscatory upon a similar state of facts, the legislature could have barred a judicial review of the question of \$1,000,000 or \$1,050,000. The legislature could have barred the judicial review, even if 7% had been fixed as the legal return by the law instead of by the courts. Had 7% been fixed by the courts or the constitution of the state, while the Supreme Court of the United States was satisfied with a 6% return, there would have been no right to a judicial review under the 14th Amendment, but there would be, if the federal doctrine were followed in the particular state.

Suppose we accept the federal doctrine as sound law, and adopt it for purely state questions, what follows? A constitution says that the county tax rate cannot exceed seventy-five cents on one hundred dollars without a popular vote. The county taxing authorities, without a referendum, make a rate of seventy-five cents. Every question of valuation becomes a judicial question as soon as I contend that my property is assessed at more than its true value. The same, if the constitution fixes a maximum rate for an income tax; or if the courts hold that taxation must be reasonable, and fix upon a certain tax rate as the maximum reasonable rate. The practical result is an impossibility, for it makes the courts in effect assessing authorities.

Where is the fallacy? It lies in ignoring that although rights based on value are made constitutional rights, the nature of value and of valuation is not thereby changed; it remains an adminis-

trative, non-judicial process. I have a right under the constitution to have my property taxed at a rate not higher than seventy-five cents on one hundred dollars; that means on one hundred dollars of value assessed by the ordinary methods which are administrative methods. It may be that this can be gathered from other constitutional provisions concerning assessment, but it is true whether assessment is regulated by the constitution or not.

More specifically, I believe that the Supreme Court erred in confusing the inevitable possibilities resulting from differences in fair valuation with confiscatory valuation. What does confiscatory valuation mean? It is not the difference between \$1,000,000 and \$1,050,000, which can be made the criterion. A valuation is confiscatory when it is unfair or unreasonable, ignoring established principles, incontestable facts, or ordinary honesty. Such a valuation is judicially reviewable under the law of every state; to contend for such a principle under the 14th Amendment is to push in an open door.

The problem of due process as applied to the relation between judicial and administrative jurisdiction, is reasonably clear, although there may be no agreement as to how it should be answered. There are certain questions that have to be determined judicially in the first instance: such are questions of property and of obligation as between individuals, and the question of criminal guilt or innocence. There are other questions that may be left to administrative determination in the first instance: broadly speaking, they cover the entire field of the police and taxing power. Well established principles of common law and equity permit a judicial review of administrative determinations, wherever there is a question of jurisdiction, and where there is an abuse of power. Ordinarily, there is also a judicial review on any question of law; sometimes there is a judicial review on facts, sometimes there is not. I think there ought to be a constitutional right to a judicial review on facts to the extent that it is secured by the New York Code of Civil Procedure with regard to *certiorari*, *i. e.*, to the same extent that there can be a relief against the verdict of a jury; but I believe such a right is, as a matter of fact, not recognized as a constitutional right in this country.

Where, on the other hand, the question presented is one of opinion or of expediency,—and questions of value belong to the former category,—there is no right to one decision rather than another, so long as the decision is fairly reached; therefore there

is no judicial issue within the doctrine of the separation of powers. An independent judicial review of discretion is an administrative function vested in a court.

In accordance with the above principles, it has always been understood that a fair administrative valuation can constitutionally be made conclusive; and if the Ben Avon Case qualifies this by making the right to a judicial review absolute in cases where fair differences of valuation result in touching an arbitrary line between confiscatory and non-confiscatory rates, the Supreme Court establishes a new doctrine which in my opinion will turn out to be practically unworkable.