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## NOTES

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### THE FEDERAL INJUNCTION AND STATE COMMISSIONS: THE RULE OF THE *PRENTIS* CASE

The exercise by the federal courts of the power to enjoin activities of state regulatory commissions<sup>1</sup> has been subjected to much criticism,<sup>2</sup> since a great part of the litigation involves highly controversial questions of interpretation

<sup>1</sup> This power is based on the principle stated in *Ex parte Young*, 209 U.S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714 (1908): a state official exceeding the authority granted him by the state is personally subject to suit in the federal courts; the action is not one against the state, within the meaning of the Eleventh Amendment.

<sup>2</sup> As a result Congress has passed an act providing for a special three-judge federal court whenever an interlocutory injunction is sought to restrain the enforcement of any state statute,

of state constitutions and statutes on which state courts are best qualified to pass.<sup>3</sup> It is not surprising, therefore, to find that the Supreme Court has evolved a number of limitations on this broad injunctive power.<sup>4</sup>

One such self-imposed limitation, first enunciated in *Prentis v. Atlantic Coast Line Co.*,<sup>5</sup> requires the federal courts to refrain from enjoining the enforcement of orders of a state commission which are still subject to "legislative" revision by another state agency. Although the revising body may be termed a court, and may perform other functions of an undoubtedly judicial nature, it may be empowered by statute to revise commission orders upon the same general considerations—policy and expediency—that motivated the commission. Until such revision is completed an order is still in the "legislative" stage, and as a matter of "comity" it is thought best to require a litigant to exhaust his legislative remedies before appealing to the courts; he may eventually find it unnecessary to seek an injunction.<sup>6</sup>

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or commission order under a state statute; see Judicial Code § 266, 36 Stat. 1162 (1911) 28 U.S.C.A. § 380 (1928); cf. the pending Johnson Bill, S. 752, which would deprive the federal courts of all injunctive jurisdiction over state legislative or administrative action; 1 U.S. Law Week 497 (1934); Hutcheson, *A Case for Three Judges*, 47 Harv. L. Rev. 795 (1934).

<sup>3</sup> See Frankfurter and Landis, *Business of the Supreme Court at October Term, 1928*, 43 Harv. L. Rev. 33, 61-62 (1930); Lilienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 Harv. L. Rev. 379 (1930); cf. Barnes, *Federal Courts and State Regulation of Utility Rates*, 43 Yale L. Jour. 417 (1934).

<sup>4</sup> In *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 49 Sup. Ct. 282, 73 L. Ed. 652 (1929), a complicated and important piece of utilities litigation was denied a federal adjudication, mainly because it presented primarily state issues and could be dealt with more effectively in the state courts. See Frankfurter and Landis, *supra* note 3; Lilienthal, *supra* note 3, 398-399. And recently, in *Glenn v. Field Packing Co.*, 290 U.S. 177, 54 Sup. Ct. 138 (1933), a decree of a federal district court that a state tax statute violated the state constitution was modified to permit further application to the court, "in case it shall appear that the statute has been sustained [subsequently] by the state court as valid under the state constitution."

<sup>5</sup> 211 U.S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150 (1908). Holmes, J., said, "It seems to us only a just recognition of the solicitude with which [complainant's] rights have been guarded, that they should make sure that the State in its final legislative action would not respect what they think their rights to be, before resorting to the courts of the United States." (211 U.S. 210, 230).

<sup>6</sup> This rule perhaps might have been based on general jurisdictional grounds; until a legislative order is in final, enforceable form, there is nothing to which an injunction will attach. However, the reason given for the rule was "equitable fitness and propriety;" reduced in later cases to "comity." The rule has been applied to legislative proceedings other than appeals to courts, such as rehearings in commission, *Palermo Land & Water Co. v. Railroad Commission of California*, 227 Fed. 708 (D.C.N.D. Cal. 1915), appeal dismissed 225 Fed. 1022 (C.C.A. 9th 1915); *Columbia Railway, Gas & Electric Co. v. Blease*, 42 F. (2d) 463 (D.C.E.D.S.C. 1930). Other proceedings of administrative nature were pending in *Mellon Co. v. McCafferty*, 239 U.S. 134, 36 Sup. Ct. 94, 60 L. Ed. 181 (1915), and *Henderson Water Co. v. Corporation Commission*, 269 U.S. 278, 46 Sup. Ct. 112, 70 L. Ed. 273 (1925).

The rule has no application to a suit to enjoin enforcement of the statute which defines the commission's powers. *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 29 Sup. Ct. 192, 53 L. Ed.

On the other hand, the power of the revisory agency may be "judicial" in nature, confined to questions of the conformity of the order to constitutional and statutory requirements, not its policy or expedience. The "legislative" process is then deemed complete when the commission promulgates its order. Instead of applying to a state court for relief, a litigant may, if proper jurisdictional grounds exist, seek the assistance of a federal court, which is considered as competent as any state court to pass on questions of a judicial nature.<sup>7</sup>

Many states have constitutional or statutory provisions for the revision of orders,<sup>8</sup> but the language used is often ambiguous and shows that the draftsmen did not have in mind the distinction drawn in the *Prentis* case. As a result, the application of the rule of that case to a particular statute may be difficult. If the highest court of a state has held that the type of review intended is either "legislative" or "judicial," the federal courts will respect that decision, provided that the state court's definition is not at variance with the federal concept of the two types of review.<sup>9</sup> But in the absence of any determinative decision by the state tribunal, the federal courts must decide for themselves when the "legislative" process is complete.

The question then becomes: what are the criteria of each of the two types of review? It seems that the possible differentiating factors may be grouped as follows: (1) the scope of the revisory inquiry; (2) the form of the revisory proceeding; (3) the evidence which the revising agency may consider; (4) the power of

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382 (1909). The rule is disregarded when, in the course of the legislative proceedings, there is a violation of due process, such as undue delay, *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 46 Sup. Ct. 408, 70 L.Ed. 747 (1926); or refusal of *supersedeas*, either by statute, *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U.S. 196, 44 Sup. Ct. 553, 68 L. Ed. 975 (1924), or by the reviewing body, *Oklahoma Natural Gas Co. v. Russell*, 261 U.S. 290, 43 Sup. Ct. 353, 67 L. Ed. 659 (1923). See Lillenthal, *supra* note 3, 391, 399 ff.

<sup>7</sup> *Bacon v. Rutland R.R. Co.*, 232 U.S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538 (1914). See Isaacs, *Judicial Review of Administrative Findings*, 30 *Yale L. Jour.* 781 (1921).

<sup>8</sup> See note, 25 *Mich. L. Rev.* 178 (1926) for a list, now perhaps only partial, of these states, and a summary of the provisions. The present paper is confined, with few exceptions, to statutes which have been examined by the United States Supreme Court.

<sup>9</sup> This was true in both the *Prentis* and *Bacon* cases, *supra* notes 5 and 7. *Winchester & S.R. Co. v. Commonwealth*, 106 Va. 264, 55 S.E. 692 (1906); *Bacon v. Boston & M.R.R.*, 83 Vt. 421, 457, 76 Atl. 128, 143 (1910). On the Virginia system, see Dobie, *Judicial Review of Administrative Action in Virginia*, 8 Va. L. Rev. 477, 557 (1922).

The statute allowing appeals from the Illinois Commerce Commission has never been examined by the United States Supreme Court; however, the Illinois Supreme Court has definitely determined that the statute provides for "judicial" review. *Ill. Cahill's Rev. Stat.* (1933), c. 111A, § 87; *People's Gas Co. v. City of Chicago*, 309 Ill. 40, 139 N.E. 867 (1923); *Wabash, C.&W. R.R. Co. v. Commerce Commission*, 309 Ill. 412, 141 N.E. 212 (1923). A provision that an order should not be set aside unless "against the manifest weight of the evidence" has been declared unconstitutional, since the judicial test is whether there is any substantial basis for the findings. *Commerce Commission v. Cleveland, C., C. & St.L. Ry. Co.*, 309 Ill. 165, 140 N.E. 868 (1923). See *Smith, Judicial Review of the Decisions of the Illinois Commerce Commission*, 24 *Ill. L. Rev.* 423 (1929).

the revising agency to modify the commission's order (as distinguished from affirmance or reversal *in toto*); and (5) the effect of the revising agency's determination as *res judicata*.

(1) *The scope of the revisory inquiry.* Direct statements as to the extent to which it is intended the revising agency shall have power to examine the commission's order are extremely rare. The clearest expression is found in a New York statute providing for review of the orders of the public service commission. The issues to be considered on review are limited to: (a) the authority of the inferior body to make the order; (b) the conformity of the order to law; (c) the competence of the proof taken; and (d) the consistency of the order with the weight of the evidence.<sup>10</sup> This provision gives no power to consider the expedience of the order; the revision contemplated is definitely "judicial."

Several other types of provisions, although often found, are not as clear. For example, the reviewing agency may be directed to proceed as in chancery, and make its decision as law or equity shall require.<sup>11</sup> Perhaps on its face such a pro-

<sup>10</sup> N.Y. Civil Practice Act (1927), §§ 1304, 1305. See *Prendergast v. New York Telephone Co.*, 262 U.S. 43, 43 Sup. Ct. 466, 67 L. Ed. 853 (1923). Compare the Supreme Court's analysis of "judicial" review in *Interstate Commerce Commission v. Illinois Central R. Co.*, 215 U.S. 452, 470, 30 Sup. Ct. 155, 160, 54 L. Ed. 280 (1910).

Compare also the analogous situation existing under the appellate provisions of the Federal Radio Act. The act of 1927, 44 Stat. 1169 (1927), 47 U.S.C.A. Supp. § 96 (1933), allowing appeals from the Federal Radio Commission to the District of Columbia Court of Appeals, was construed to establish "legislative" review. As a result, no appeal could be taken to the Supreme Court from the Court of Appeals, since the proceeding would be an original judicial action and would constitute an attempt to add to the original jurisdiction of the Supreme Court, in contravention of U.S. Const. Art. III. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 50 Sup. Ct. 389, 74 L. Ed. 969 (1930); see Caldwell, *Appeals from Decisions of the Federal Radio Commission*, 1 *Jour. Air Law* 274, 276-279 (1930); notes, 29 *Mich. L. Rev.* 766 (1931), 1 *Jour. Air Law* 353 (1930). Congress then amended the Radio Act to limit the review of the Court of Appeals to "questions of law"; the fact findings of the commission to be "conclusive unless it shall clearly appear that the findings . . . are arbitrary or capricious." 46 Stat. 844 (1930), 47 U.S.C.A. Supp. § 96 (1933). The Supreme Court readily recognized that the section as amended provided for "judicial" review by the Court of Appeals; hence the proceedings before the Supreme Court were no longer original judicial proceedings, and constituted part of the appellate jurisdiction of the court. *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 53 Sup. Ct. 627, 77 L. Ed. 808 (1933). Cf. act providing for review of decisions of the Interstate Commerce Commission, 36 Stat. 542 (1910), 38 Stat. 219 (1913), 28 U.S.C.A. §§ 41 (28), 44-48, notes; Tollefson, *Judicial Review of Decisions of the Interstate Commerce Commission*, 11 *Minn. L. Rev.* 389, 504, 510 ff. (1927). See in general Albertsworth, *Judicial Review of Administrative Action by the Federal Supreme Court*, 35 *Harv. L. Rev.* 127 (1921).

<sup>11</sup> *Michigan*: Comp. Laws (1929), § 11042a; *Detroit & Mackinac Ry. Co. v. Michigan R.R. Commission*, 235 U.S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288 (1914). *Minnesota*: Laws (1921), c. 278, § 10; *Railroad & Warehouse Commission v. Duluth Street Ry. Co.*, 273 U.S. 635, 47 Sup. Ct. 489, 71 L. Ed. 807 (1927); *Duluth v. Railroad & Warehouse Commission*, 167 *Minn.* 311, 209 *N.W.* 10 (1926). *Montana*: Rev. Code (1921), § 4038, as amended Laws (1931), c. 194, § 3; *Porter v. Investors' Syndicate*, 286 U.S. 461, 52 Sup. Ct. 617, 76 L. Ed. 1226 (1932). *Pennsylvania*: 66 *Purdon's Stats.* (1930) § 838; *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908 (1920). *Vermont*: Acts (1908), No. 116, § 12; *Bacon v. Rutland R.R. Co.*, *supra* note 7.

vision looks to a re-investigation of the facts only so far as is necessary to determine the legality of the order. But it is possible that the words "law" and "equity" are used in the loose sense of "justness," which would at least admit of the interpretation that the entire inquiry may be reopened, and questions of expediency and policy determined.<sup>12</sup>

Frequently the reviewing agency is authorized to determine the "justness"<sup>13</sup> or "reasonableness"<sup>14</sup> or "lawfulness"<sup>15</sup> of the order. The first expression would seem to point to "legislative" review, including an examination of the underlying policy of the order. "Reasonableness" seems so ambiguous that it provides no clue either way: it might apply to the commission's exercise of discretion, or to the consistency of the findings with the evidence. "Lawfulness" perhaps tends to indicate that review of the legality, only, of the commission's findings is contemplated. The Supreme Court seems to attach no importance to these terms.

(2) *The form of the revisory proceeding.* A few statutes refer to the proceeding to review an order as an "action,"<sup>16</sup> thus perhaps implying an original, not an appellate, proceeding. If original, the proceeding would seem to be "judicial" in nature, since only a "legislative" inquiry would be an appeal from, and part of, the commission's activities. The term, however, has been accorded little or no weight, and the colorless word "proceeding" is probably as satisfactory.

Conversely, several statutes provide for an "appeal" from the order of the commission.<sup>17</sup> This word may be interpreted to refer to "legislative" proceedings, since it is a continuation of the activities of the commission, and not an original suit; and such an interpretation is especially plausible when the statute provides, as in Oklahoma, that the review by the state supreme court "shall complete the appeal allowed by law" from the assessment proceedings before an

<sup>12</sup> In the analogous situation of review of the orders of the Public Utilities Commission of the District of Columbia by the District Court of Appeals, the Supreme Court has construed the term "equity proceedings" to mean that a trial *de novo* may be conducted and such order promulgated as the commission should have made, and has thus held the review is "legislative." 37 Stat. 974, 988 (1913); *Keller v. Potomac Electric Co.*, 261 U.S. 428, 43 Sup. Ct. 445, 67 L. Ed. 731 (1922).

<sup>13</sup> *Montana: supra* note 11. *Virginia: Const.* (1902), § 156 f.

<sup>14</sup> *Michigan, Montana, Pennsylvania: supra* note 11. *Ohio: Throckmorton's Code* (1929), § 544; *Grubb v. Public Utilities Commission*, 281 U.S. 470, 50 Sup. Ct. 374, 74 L. Ed. 972 (1930); *Hocking Valley Ry. Co. v. Public Utilities Commission*, 92 Ohio St. 9, 110 N.E. 521 (1915); *Hocking Valley Ry. Co. v. Public Utilities Commission*, 100 Ohio St. 321, 126 N.E. 397 (1919); note, 29 Mich. L. Rev. 1067 (1931). *Virginia: supra* note 13. *Washington: Remington's Comp. Stat.* (1922), § 10428; *Pacific Tel. & Tel. Co. v. Kuykendall, supra* note 6; *Pacific Tel. & Tel. Co. v. Cushman*, 292 Fed. 930 (C.C.A. 9th 1923), cert. den. *Cushman v. Pacific Tel. & Tel. Co.*, 263 U.S. 729, 44 Sup. Ct. 181, 68 L. Ed. 529 (1924).

<sup>15</sup> *Michigan, Pennsylvania: supra* note 11. *Ohio, Washington: supra* note 14.

<sup>16</sup> *Michigan, Montana: supra* note 11.

<sup>17</sup> *Minnesota: supra* note 11. *Ohio: supra* note 14. *Oklahoma: Stat.* (1931), § 12661; Ex parte *Oklahoma*, 37 F. (2d) 862 (C.C.A. 10th 1930); *Kansas City Southern Ry. Co. v. Cornish*, 65 F. (2d) 671 (C.A.A. 10th 1933); *Anderson v. Ritterbusch*, 23 Okla. 761, 98 Pac. 1002 (1908); *In re Earlsboro Assessment*, 25 P. (2d) 632 (Okla. 1933). *Vermont: supra* note 11. *Virginia: Const.* (1902), § 156d.

administrative board, and that this statutory provision "shall be construed to give remedies and rights in addition to those of appeal heretofore given by statute, but the remedies of resort to the boards and appeal therefrom shall be the sole remedies for the correction of assessment or equalization."<sup>18</sup> In general however, it seems probable that the word "appeal" is used in the loose sense of invoking the aid of the revisory agency, and conveys no information as to the type of proceeding contemplated.

The fact that the reviewing agency is authorized to grant a *supersedeas*, or stay of enforcement, of the order pending review,<sup>19</sup> seems of little importance in determining the character of review intended, although it may raise a question of compliance with due process.<sup>20</sup>

(3) *The evidence which may be considered by the revising agency.* The practice has become quite general to confine the review of the commission's orders to the transcript of the proceedings before the commission, and to exclude additional evidence.<sup>21</sup> Such a limitation might seem to indicate that "legislative" review was contemplated, since the orthodox theory of original "judicial" proceedings requires that evidence be collected through the court's own fact-finding agencies. To some extent this conclusion is sanctioned by the recent Supreme Court case of *Crowell v. Benson*,<sup>22</sup> holding that, at least under the federal separation of powers, a reviewing court may not be confined to the transcript of commission proceedings in so far as "jurisdictional facts" are in issue, the existence of which is a statutory condition precedent to the power of the commission to act. The decision was limited expressly to the federal constitutional system; but most state governments are similar in structure and embody the same principles of an independent judiciary; hence *Crowell v. Benson* would seem to be a very persuasive authority.

The limits of this "jurisdictional fact" doctrine are still undefined, and its ap-

<sup>18</sup> Okla. Stat. (1931), §§ 12661, 12663.

<sup>19</sup> *Supersedeas* is expressly permitted in *New York*, *supra* note 10; *Ohio*, *supra* note 14; *Pennsylvania*, *supra* note 11; and *Washington*, *supra* note 14, all of which have "judicial" review; also in *Virginia*, Const. (1902), § 156e, where review is "legislative."

<sup>20</sup> See *supra* note 6; also *Porter v. Investors' Syndicate*, *supra* note 11. Cf. *Banton v. Belt Line Ry. Corp.*, 268 U.S. 413, 45 Sup. Ct. 534, 69 L. Ed. 1020 (1925).

<sup>21</sup> *Michigan*: *supra* note 11. *Nebraska*: Comp. Stat. (1929), c. 75, § 505; *Northwestern Bell Telephone Co. v. Spillman*, 6 F. (2d) 663 (D.C. Neb. 1925); *Hooper Telephone Co. v. Nebraska Telephone Co.*, 96 Neb. 245, 147 N.W. 674 (1914); see *Durisch*, *Judicial Review of the Railway Commission in Nebraska*, 11 Neb. L. Bull. 365, 371 (1932). *Ohio*: *supra* note 14. *Oklahoma*: *supra* notes 17, 18. *Pennsylvania*: *supra* note 11. *Virginia*: *supra* note 13. *Washington*: *supra* note 14. Some statutes provide that if new evidence is offered, the court shall remand to the commission, for hearing on the new evidence; and if, as a result, the commission shall revise its order, the revised order shall be substituted in the proceedings before the court. See statutes of *Michigan*, *Pennsylvania*, and *Virginia*, *supra*.

<sup>22</sup> 285 U.S. 22, 52 Sup. Ct. 285, 76 L. Ed. 598 (1932). See *Dickinson*, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 Univ. Pa. L. Rev. 1055 (1932); notes, 41 Yale L. Jour. 1037 (1932); 30 Mich. L. Rev. 1312 (1932); 46 Harv. L. Rev. 478 (1933); 32 Col. L. Rev. 738 (1932).

plication to regulatory commissions has not yet been attempted; but it would seem to extend at least to questions of the commission's power over the subject matter of the proceeding, and over the parties thereto. Whether the theory will be accepted by the state courts, however, seems doubtful, in view of the readiness with which they have accepted restriction to the transcript while holding that the review provided for is "judicial" rather than "legislative" in nature.<sup>23</sup> It may also be doubted whether the Supreme Court would consider such a state statutory provision a good criterion of "legislative" review.

On the other hand, state constitutional provisions for the separation of judicial and legislative powers appear, in several cases, to have been important factors in determining that the review prescribed was "judicial" rather than "legislative"; it is assumed that the state assembly, in according the power of review to a body exercising other functions undoubtedly judicial in nature, intended to comply with the constitutional requirements; and ambiguous language therefore is construed to contemplate "judicial" review.<sup>24</sup>

(4) *The power of the revising agency to modify the commission's order.* An expression often noticed in the statutes is that the reviewing agency may "modify" the order of the commission, as an alternative to either affirming or reversing it as a whole.<sup>25</sup> This perhaps means that the reviewing body may make a thorough revision of the order on the basis of policy and expediency, perhaps conceding the legality of the commission's original action; such review would be "legislative."<sup>26</sup> The term "modify" is so general, however, that it may well be construed to limit the power of the revising agency to removing provisions considered illegal, without reference to questions of policy or expediency. As a result, it is not surprising that modification provisions are found in statutes interpreted to prescribe "judicial" as well as "legislative" review.<sup>27</sup>

The same interpretation would be made, probably, if the word "substitute" was used in place of "modify." The Virginia Constitution provides that the Court

<sup>23</sup> Restriction specifically held valid in *Illinois, Commerce Commission v. Cleveland, C., C. & St. L. Ry. Co.*, *supra* note 9.

<sup>24</sup> See cases cited: *Michigan, supra* note 11; *Nebraska, supra* note 21; *Vermont, supra* note 11; *Washington, supra* note 14. In *Ohio*, the Constitution (1912), Art. IV, § 2, provides that the supreme court shall have "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."

<sup>25</sup> *Minnesota, Montana: supra* note 11. *Nebraska: supra* note 21. *New York: supra* note 10. *Ohio: supra* note 14. *Oklahoma: supra* note 17. *Pennsylvania: supra* note 11.

<sup>26</sup> The *Montana* statute, *supra* note 11, was construed by the United States Supreme Court as providing "legislative" review, the court relying mainly upon the term "modify" in the statute (*Porter v. Investors' Syndicate, supra* note 11). Other expressions in the statute seemed to point the other way, however, and the *Montana* Constitution, Art. IV, § 1, provides for separation of powers [its effect perhaps weakened by *O'Neill v. Yellowstone Irrig. Dist.*, 44 Mont. 492, 121 Pac. 283 (1912); and see *State ex rel. Hillis v. Sullivan*, 48 Mont. 320, 137 Pac. 392 (1913)].

<sup>27</sup> "Judicial": *Minnesota, Nebraska, New York, Pennsylvania.* "Legislative": *Montana, Oklahoma.*

of Appeals "is to substitute such order as, in its opinion, the commission should have made."<sup>28</sup> Due perhaps to the addition of the last clause, this provision seems to point toward revision on grounds of expediency, and in fact has been so interpreted.<sup>29</sup>

(5) *The effect of the revising agency's decision.* If adequately expressed, the intention of the state legislature as to whether or not the decision of the revising agency was intended to be *res judicata* would probably provide a good test of the nature of the review provided. The present statutes, however, afford little information on this point. In Virginia it is stipulated that the right to sue in "ordinary courts" is not impaired by the revisory system created, indicating perhaps that the decision of the revising tribunal is not intended to be *res judicata*.<sup>30</sup> An Oklahoma statute provides that it "shall be construed to give remedies and rights in addition to those of appeal heretofore given by statute";<sup>31</sup> this, too, seemingly contemplates that the action of the revisory agency is not final. In both states the review provided has been determined to be of the "legislative" type.<sup>32</sup>

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<sup>28</sup> Va. Const. (1902), § 156g. This section was not changed in the constitutional revision of 1928.

<sup>29</sup> See *Winchester & S.R. Co. v. Commonwealth*, *supra* note 9.

<sup>30</sup> Va. Const. (1902), § 156h. Compare the federal statute providing for appeals from decisions of the Commissioner of Patents, 16 Stat. 204 (1870), 35 U.S.C.A. § 62 (1929): "But no opinion or decision of the court in such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question." See *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 47 Sup. Ct. 284, 71 L. Ed. 478 (1927). See also, as to *res judicata*, *Grubb v. Public Utilities Commission*, *supra* note 14.

<sup>31</sup> *Supra* note 18.

<sup>32</sup> Cases cited *supra* notes 5, 9, 17.