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Administrative Law--The Abolition of the Negative Order Doctrine

Alan R. Vogeler
University of Kentucky

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CASE COMMENTS

ADMINISTRATIVE LAW—THE ABOLITION OF THE NEGATIVE ORDER DOCTRINE

The Communication Act of 1934¹ provided that the Federal Communications Commission should not have jurisdiction over carriers engaged in interstate commerce solely through physical connections with the facilities of another carrier, unless they are under the control of such carrier. In order to obtain knowledge of communication practices, the Commission required all telephone carriers subject to the Act to file certain statements. Plaintiff, engaged in interstate commerce solely through physical connection with the New York Telephone Company, refused to comply on the ground that it was not under the control of the New York Company. After a full hearing, the Commission determined that plaintiff was under New York control and ordered it classified as subject to all telephone carrier provisions of the 1934 Act. In the District Court, Plaintiff's appeal from this order was dismissed on its merits, and a further appeal was made to the Supreme Court. On the latter appeal the Commission contended that since the order classifying Plaintiff as subject to its jurisdiction was a "negative order", it was not subject to judicial review. The Court (opinion by Mr. Justice Frankfurter) abolished the doctrine of negative orders and held the order subject to review, although the appeal was dismissed on the merits.²

The doctrine that negative orders of an administrative body are not subject to review by the judiciary was first announced in the case of *Proctor & Gamble v. United States*.³ In that case the plaintiff had applied to the Interstate Commerce Commission for an order forbidding the carriers to continue certain demurrage charges. The plaintiff's application was denied, and it finally appealed to the Supreme Court, which held that such an order was not reviewable because it was negative. The court determined that the words "any order" in the statute⁴ conferring power of review to the judiciary gave the courts power to set aside or enjoin only such orders as they might enforce. Thus the apparent origin of the doctrine was a matter of statutory construction, the court interpreting the words "any order" to exclude a refusal by the administrative body to grant relief. The reason impelling the decision, however, was a desire to achieve a proper adjustment of governance between the administrative and judicial authority in order

¹47 U. S. C. A. Sec. 152 (b).

²*Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, 59 S. Ct. 754, 83 L. ed. 1147 (1939).

³225 U. S. 282, 32 S. Ct. 761, 56 L. ed. 1091 (1912).

⁴36 Stat. 1087, 1148; Sec. 207 of the Judiciary Act of March 3, 1911.

properly to carry out the purposes for which the administrative body was created.⁵

After *Proctor & Gamble v. United States*, numerous cases followed the negative order doctrine.⁶ Mr. Justice Frankfurter classifies these cases as follows:⁷

- "1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. . . .⁸
- "2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part. . . .⁹
- "3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is attacked because it does not forbid or compel conduct by a third person. . . .¹⁰

But even under such a classification the distinction between affirmative and negative orders is a tenuous one.¹¹ For example, in two cases with similar facts, opposite decisions were reached.¹²

⁵ 225 U. S. 282, 294-298. Mr. Justice Frankfurter brings this out in the Rochester case, 307 U. S. 125, 137, 59 S. Ct. 754, 760, 83 L. ed. 1147, 1156 (1939). At first glance it appears that the Rochester case, by abolishing a doctrine which limited judicial review, widens the extent of judicial control of administrative action. To the effect that such control is not broadened, see *infra* n. 16.

⁶ *Hooker v. Knapp*, 225 U. S. 302, 32 S. Ct. 769, 56 L. ed. 1099 (1912); *Lehigh Valley Ry. v. U. S.*, 243 U. S. 412, 37 S. Ct. 397, 61 L. ed. 819 (1917); *Great Northern Ry. v. U. S.*, 277 U. S. 172, 48 S. Ct. 466, 72 L. ed. 838 (1928); *Piedmont & N. Ry. v. U. S.*, 280 U. S. 469, 50 S. Ct. 192, 74 L. ed. 551 (1930); *Standard Oil v. U. S.*, 283 U. S. 235, 75 L. ed. 999 (1931); *U. S. v. Griffin*, 303 U. S. 226, 58 S. Ct. 601, 82 L. ed. 764 (1938); *Diamond Tank Transport v. I. C. C.*, 23 F. Supp. 497 (D. Wash. 1938), *aff'd* 305 U. S. 567, 59 S. Ct. 243, 83 L. ed. 436 (1939).

⁷ 307 U. S. 125, 129, 59 S. Ct. 754, 756, 83 L. ed. 1147, 1152 (1939).

⁸ For example, where an attempt is made to review an I. C. C. valuation: 307 U. S. 125, 129, 59 S. Ct. 754, 756, 83 L. ed. 1147, 1152 (1939).

⁹ For example, where the I. C. C. denies permission to depart from the long-short haul clause; 307 U. S. 125, 129, 59 S. Ct. 754, 756, 83 L. ed. 1147, 1152 (1939).

¹⁰ For example, where a shipper requests the I. C. C. to order a carrier to adopt certain rates, which the Commission declines to do: 307 U. S. 125, 130, 59 S. Ct. 754, 757, 83 L. ed. 1147, 1152 (1939). For a specific discussion of whether the various classes of negative orders are correctly interpreted, and a discussion of what cases are included in the categories, see McAllister, *Statutory Roads to Review of Federal Administrative Orders* (1940), 28 Calif. L. Rev. 129, 139-143; Notes (1939) 24 Wash. U. L. Quar. 591, (1940) 24 Minn. L. Rev. 379.

¹¹ *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, 140, 59 S. Ct. 754, 762, 83 L. ed. 1147, 1158 (1939).

¹² Compare *Pacific Power and Light Co. v. Fed. Power Com'n*, 98 F. (2d) 835 (C. C. A. 9th 1938), *aff'd* 307 U. S. 156, 59 S. Ct. 766, 83 L. ed. 1180 (1939), with *Newport Electric Corp. v. Fed. Power Com'n*, 97 F. (2d) 580 (C. C. A. 2d 1938), where on essentially similar facts (application for a license to merge public utility after a showing of public convenience and necessity) refusal of the Commission to grant

In the *Proctor & Gamble* case Mr. Justice White apprehended that judicial review where the Interstate Commerce Commission had refused to give relief would be an invasion of the administrative function, and therefore the courts should not review that refusal.¹³ The decision, doctrinalized and mechanically followed, ignores the fact that where a negative order of the administrative agency substantially affects rights, judicial review of such order is no more an invasion of the administrative power than where the order is affirmative in form.¹⁴

The negative order doctrine, evolved to effectuate the board considerations compelling independent administrative judgment, has tortured those considerations into a technical matter of form which no longer is concerned with the proper distribution of governmental power between the judiciary and administrative bodies, but merely with the language in which the administrative agency's order has been couched.¹⁵ Because of this, the doctrine is better done away with if the courts are able, without it, consciously to achieve the results originally desired.¹⁶ A proper coordination of administrative and judicial activity can be attained by the doctrines which Mr. Justice Frankfurter in the principal case terms "primary jurisdiction"¹⁷ and "administrative finality".¹⁸

a license was held in the first case reviewable as an affirmative order, and in the second, non-reviewable as negative. Commented upon at (1939) 52 Harv. L. Rev. 522 (written while Mr. Justice Frankfurter was professor of administrative law at Harvard, and suggesting the negative order doctrine be abolished as unnecessary. The note points out that the doctrine is a matter of form rather than substance. In the Rochester case, Mr. Justice Frankfurter explains that the doctrine is merely a matter of form. 307 U. S. 125, 142, 59 S. Ct. 754, 763, 83 L. ed. 1147, 1159 (1939).

¹³ *Proctor and Gamble v. U. S.*, *supra* n. 4.

¹⁴ See to that effect: Notes (1938) 47 Yale L. Jour. 766, 787, (1939) 52 Harvard L. Rev. 522.

¹⁵ *Supra* n. 12.

¹⁶ That theories of "administrative finality" and "primary jurisdiction" as used by Mr. Justice Frankfurter will achieve the same results, see: Notes (1938) 51 Harvard L. Rev. 1251 (1939) 18 Chicago-Kent L. Rev. 74, 89, (1939) 52 Harvard L. Rev. 522, (1939) 25 Virginia L. Rev. 981, (1939) 24 Wash. U. L. Quar. 591, 594-595, (1940) 28 Calif. L. Rev. 129, (1940) 24 Minn. 379, 384. Mr. Justice Frankfurter so states in the principal case, 307 U. S. 125, 140, 59 S. Ct. 754, 763, 83 L. ed. 1147, 1158 (1939). But see Notes (1939) 53 Harvard L. Rev. 98, (1940) 15 Indiana L. Jour. 151.

¹⁷ By "primary jurisdiction" Mr. Justice Frankfurter means a recognition by the courts of administrative competence to decide technical matters which the statutes allocate to administrative agencies. 307 U. S. 125, 139, 59 S. Ct. 754, 761, 83 L. ed. 1147, 1157 (1939). And see Note (1938) 51 Harvard L. Rev. 1251. Thus where a shipper sues a carrier to recover charges allegedly in excess of a reasonable rate, which charges had been filed with the Interstate Commerce Commission, the shipper must first apply for relief to the Commission, and can not resort to the courts in the first instance. *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. ed. 553 (1907); *I. C. C. v. Louisville & N. Ry.*, 227 U. S. 88, 93, 33 S. Ct. 185, 187, 57 L. ed. 431 (1913). For further discussion of "primary jurisdic-

Mr. Justice Butler, concurring in the result in the instant case, complains that this does not seem to be the proper occasion for abolishing the negative order doctrine.¹⁹ Whether or not this is so, the doctrine has rightly been repudiated.

ALAN R. VOGELER

CONSTITUTIONAL LAW—JUDICIAL REVIEW OF LEGISLATIVE DETERMINATION AS TO FACT

The state constitution¹ authorized the general assembly to establish new judicial districts "having due regard to territory, business, and population." A new district was established by the legislature and suit was brought to enjoin the newly appointed judge thereof from discharging any of the duties of his office, on the ground that the general assembly failed to exercise due regard for territory, business, and population. Defendant demurred to the petition, alleging that the court had no authority to review the legislative finding as to those facts. The demurrer was overruled on the basis that it was the duty of the court to determine whether the actual facts justified the creation of the new district. *Willis v. Jonson*, 275 Ky. 538, 121 S. W. (2d) 904 (1938).²

The Kentucky court apparently decides whether or not it will review the legislative determination of fact, by investigating whether or not the act was passed in pursuance of an express authority or duty granted or placed upon the General Assembly by the Kentucky Constitution. If the legislature has power to act only in certain contingencies, the court will look to see if such contingency exists;³ but

tion", see McAllister, *Statutory Roads to Review of Federal Administrative Orders*, (1940) 28 Calif L. Rev. 129, 143-150; Note (1939) 18 Chicago-Kent L. Rev. 74, 79 et seq.

¹⁸ By "administrative finality" Mr. Justice Frankfurter means that findings of fact of an administrative agency will be conclusive as to such facts. 307 U. S. 125, 142, 59 S. Ct. 754, 763, 83 L. ed. 1147, 1159 (1939). Thus, where the Interstate Commerce Commission determines that a reshipping privilege granted by a carrier is an undue preference not allowed by law, the court has no power to disturb that finding. *U. S. v. Louisville & N. Ry.*, 235 U. S. 314, 35 S. Ct. 113, 59 L. ed. 245 (1914). *Accord*: *I. C. C. v. Illinois C. Ry.*, 215 U. S. 452, 30 S. Ct. 155, 54 L. ed. 280 (1909); *I. C. C. v. Union P. Ry.*, 222 U. S. 451, 32 S. Ct. 108, 56 L. ed. 308 (1911). For further discussion of "administrative finality" see McAllister, *Statutory Roads to Review of Federal Administrative Orders*, (1940) 28 Calif. L. Rev. 129; Note (1939) 18 Chicago-Kent L. Rev. 74.

¹⁹ *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, 146, 59 S. Ct. 754, 765, 83 L. ed. 1147, 1161 (1939).

¹ Ky. Const., Sects. 128 and 132.

² On a second appeal the court reviewed the evidence upon which the Legislature acted, and finding that it did not contradict the constitutional provision, affirmed the decision of the trial court. *Willis v. Jonson*, 279 Ky. 416, 130 S. W. (2d) 828 (1939).

³ *Zimmerman v. Brooks*, 118 Ky. 85, 80 S. W. 443 (1904); *Ragland v. Anderson*, 125 Ky. 141, 100 S. W. 865 (1907); *Scott v. McCreary*, 148 Ky. 791, 147 S. W. 903 (1912); *Nolan v. Jones*, 215 Ky. 238, 184 S. W. 1054 (1926).