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Judicial Review of the Fact Findings of the Federal Trade Commission

William G. Daniels

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notice of the agreement has already been made, equity will impose a trust upon the property in the hands of such third party in favor of the promisee.⁴⁴ It would seem that if the contract to devise is not recorded and the third party is a bona fide purchaser for value without notice, there is no remedy available against the property conveyed or the third party, but the promisee under the contract will have to resort to an action of damages against the promisor or his estate.⁴⁵

WILLARD J. WRIGHT.

JUDICIAL REVIEW OF THE FACT FINDINGS OF THE FEDERAL TRADE COMMISSION

Section 5 of the Trade Commission Act (15 U. S. C. § 45) and Section 11 of the Clayton Act (15 U. S. C. § 21) provide that "The findings of the Commission as to facts, if supported by testimony, shall be conclusive." This follows the form of the usual statutory provision, and its settled interpretation is that the findings of the administrative board, if supported by substantial evidence, are conclusive as to issues of fact.¹

The purpose of the creation of the Trade Commission was largely to establish an administrative tribunal consisting of a body of persons especially qualified by reason of information, experience and study to administer the federal program against unfair competition and monopoly. The Trade Commission Act took the function of gathering evidence entirely out of the hands of the courts and vested it in the Commission. The Commission was given the power to employ experts and examiners, including attorneys, economists, accountants and specialists in various fields.² It would seem, therefore, that by the terms "conclusive, if supported by testimony" Congress had it in mind that the administrative specialist rather than the court would determine the facts and draw the inferences therefrom.³ The test, then, which both logic and

note (1927). See also *Hayes v. Moffatt*, 83 Mont. 214, 271 Pac. 433 (1928); 5 WILLISTON, *CONTRACTS* (Rev. Ed., 1936) § 1421.

¹See *McCullough v. McCullough*, 153 Wash. 625, 631, 280 Pac. 70 (1929); *Osborn v. Hoyt*, 181 Cal. 336, 184 Pac. 854 (1919); *Van Duyne v. Vreeland*, 11 N. J. Eq. 370 (1857).

²*Van Duyne v. Vreeland*, *supra* note 44.

³*Rankin v. Hoyt*, 4 How. 327 (U. S. 1846) (custom appraiser); *Decatur v. Paulding*, 14 Pet. 497 (U. S. 1840) (pension board); *United States v. Ju Joy*, 198 U. S. 253 (1905) (immigration official); *Public Clearing House v. Cayne*, 194 U. S. 495 (1904) (post office department); *Smelting Co. v. Kemp*, 104 U. S. 636 (1881) (land office); *United States v. Williams*, 278 U. S. 255 (1929) (director of veterans' bureau); *Murray's Lessees v. Hoboken Land & Improvement Co.*, 18 How. 272 (U. S. 1856) (revenue official); *Gaines v. Thompson*, 7 Wall 347 (U. S. 1869) (secretary of interior); *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904) (postmaster general); *Zakonite v. Wolf*, 226 U. S. 272 (1912) (secretary of commerce).

⁴*Tollefson*, *Judicial Review of the Decisions of the Federal Trade Commission*, 4 Wis. L. Rev. 257.

⁵"If the findings of the Interstate Commerce Commission are final,

reason would seem to require the courts to adopt in determining whether or not the order of the Commission is to be upheld is simply this: Are the findings supported by substantial evidence? The court should not go beyond this to weigh the evidence or review the findings of fact found by the Commission. In a number of cases the Circuit Courts of Appeal have treated the findings of the Commission with due respect and have held that the findings were supported by evidence and as such were conclusive upon the courts.⁴ But the courts seem to have a natural suspicion of the functions of administrative officers and bodies and when the Commission presents a case which is not as strong as the court feels it should be it is more likely than not to set aside the administrative order and substitute therefor its own opinion. The courts have, of course, developed and evoked certain doctrines and rationalizations whereby to achieve their ends, while ostensibly obeying the legislative command. A study of the use of these rationalizations is necessary in order to determine to what extent the courts actually consider the fact findings of the Commission sufficient bases for decisions. This may perhaps best be done by first considering some of the more illustrative of those cases in which it has been found that the findings of the Commission were not supported by substantial evidence.

In *Federal Trade Commission v. Western Sugar Refining Co., et al.*,⁵ the respondents, twenty-eight in number, were charged with stifling and suppressing competition by conspiring among themselves to prevent the Los Angeles Grocery Co., a competitor, from obtaining commodities dealt in by it, by threatening not to buy from, and to boycott the goods of those manufacturers who should sell to the Los Angeles Grocery Co. The Commission found that there was conspiracy, and the findings were sustained by the Circuit Court of Appeals, but in reviewing the evidence the court said that the testimony must be sufficient as to each one of the respondents to whom an order to cease and desist is issued, and it was found that, although there was sufficient testimony to sup-

when there is more than a scintilla of evidence to support them, without an express provision in the statute it can hardly be maintained that the findings of the Federal Trade Commission should have less weight." Hankin, *Conclusions of Federal Trade Commission's Findings of Facts* (1925) 23 MICH. L. REV. 233.

⁴*Western Meat Co. v. Federal Trade Commission*, 1 F. (2d) 95 (1924); *Fox Film Corporation v. Federal Trade Commission*, 296 Fed. 353 (1924); *Southern Hardware Jobbers Assn. v. Federal Trade Commission*, 290 Fed. 773 (1923); *Juvenile Shoe Co. v. Federal Trade Commission*, 289 Fed. 57 (1923); *Wholesale Grocers' Assn. v. Federal Trade Commission*, 277 Fed. 657 (1922); *Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483 (1922); *Hill Bros. v. Federal Trade Commission*, 9 F. (2d) 481 (1926); *Proctor & Gamble Co. v. Federal Trade Commission*, 11 F. (2d) 47 (1926); *Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission*, 18 F. (2d) 886 (1927); *Federal Trade Commission v. Good Grape Co.*, 45 F. (2d) 70 (1930); *Pacific States Paper Trade Assn. v. Federal Trade Commission*, 273 U. S. 52 (1927); *Federal Trade Commission v. Keppel & Bros.*, 291 U. S. 304 (1934); *Harriett Hubbard Ayer, Inc. v. Federal Trade Commission*, 15 F. (2d) 274 (1926); *Cream of Wheat Co. v. Federal Trade Commission*, 14 F. (2d) 40 (1926).

⁵275 Fed. 725 (1921).

port the findings as to all the other respondents, there was not sufficient evidence to support the findings as to the Western Sugar Refining Co. and the California-Hawaiian Sugar Refining Co. The evidence relating to these respondents was as follows: The manager of the Los Angeles Grocery Co. testified that he had made application to both respondents to be permitted to make direct purchases of sugar and in each instance the application was refused on the grounds that the business relations of the respondents with wholesale grocers would be disrupted and that the Los Angeles Grocery Co. was a buyers' exchange for retail dealers rather than a wholesale grocery. A buyer of the Los Angeles Grocery Co. testified that he had had the same experience as the manager. A letter from a sugar broker to the Western Sugar Refining Co. urged that company not to sell to the Los Angeles Grocery Co. because the wholesale grocers of Southern California would "very much object". The court in holding this evidence to be insufficient to support the findings of the Commission with reference to these respondents said:

"There is no testimony in the record that this course of action on the part of the two sugar refiners arose from an actual understanding or agreement between them or with the Los Angeles jobbers. The testimony proves it was a concurrence of opinion as to the classification of the Los Angeles Grocery Co., but we do not find anything more in the testimony. This classification appears to have been erroneous, but as long as it was the individual opinion and action of the refiners, it could not be made the basis of a finding of conspiracy or combination between the two refiners, or between them and the jobbers, or between them and the brokers."

In *Pearsall Butter Co. v. Federal Trade Commission*⁶ the charge was that the petitioner provided for and fixed a rebate on the price charged for its oleomargarine, on the condition that its customers should deal in the petitioner's brand of oleomargarine exclusively and have no dealings with competitors of the petitioner, in violation of Section 3 of the Clayton Act, making unlawful such a contract where its effect "may be to substantially lessen competition or tend to create a monopoly." An appeal was taken to the United States Supreme Court in which the petitioner contended that the finding that the contracts substantially lessened competition or tended to create a monopoly was not supported by evidence. The basis of the finding was in the wording of the contract itself, the Commission claiming that if the petitioner entered into a contract that its customers should not deal in the goods of its competitors, and made inducements in the form of rebates if such contracts were lived up to, then it followed that there would be a tendency for those dealers to take advantage of the offer not to deal with competitors, with the result that competition would be substantially lessened and that there would be a tendency to create a monopoly. The court held that there was nothing to justify the conclusion and that what was shown was

⁶292 Fed. 720 (1923).

not more than "the mere possibility of the consequences described. There was nothing from which it might be deduced that the agreement here would, under the circumstances disclosed, possibly lessen competition or create an actual tendency to monopoly." The finding of the Commission was thus overruled on the ground that there was a mere scintilla of evidence, but no substantial evidence, to support it.

In *L. B. Silver Co. v. Federal Trade Commission*⁷ the respondent was charged with using unfair methods of competition in falsely advertising that the respondent company was a breeder of hogs of a distinct breed. The respondent claimed that the finding to the effect that its hogs were not a separate breed was not supported by the evidence. There was a sharp and irreconcilable conflict in the expert opinion evidence touching upon this question. One group of experts and breeders were of opinion that there cannot be a distinct breed originated where the blood line goes back to the old foundation stock. The experts and breeders produced by the respondent were of the opinion that a distinct breed may be originated through selection and in-breeding. The court came to the conclusion, therefore, that as the facts depended on matters of opinion rather than matters of fact, the testimony was not sufficient to support the findings of the Commission.

In *John Bene & Sons, Inc. v. Federal Trade Commission*⁸ the Commission found that the "Doxol" business of one Proper was injured by the respondent who sent out to the trade a chemist's analysis of Proper's product which was inaccurate and false. The evidence showing the injury to the business and the cause of that injury was the testimony of a beauty parlor operator, who became connected with the corporation that succeeded Proper in the manufacture of "Doxol". She became a director, the holder of one share of stock, and in her own words "operated the books of the company". She testified at length as to events that had occurred long before her connection with the concern, as to correspondence antedating her connection with Proper's successor, and as to the contents of books which were never produced. The court in holding that such testimony would not support the finding of the Commission, said:

"We regard the methods pursued in showing Proper's diminution in sales as lacking in every evidential or testimonial element of value, and opposed to that sense of fairness that is almost instinctive."

In *Federal Trade Commission v. The Curtis Publishing Co.*⁹ the respondents were charged with violations of Section 58 of the Trade Commission Act, and of Section 3 of the Clayton Act. The Commission found as a fact that the respondent had entered into contracts with persons to sell its magazines; that such persons contracted not to deal in the products of any other publisher without the respondent's written consent; that the effect of these contracts was to substantially lessen competition with respondent's mag-

⁷287 Fed. 985 (1923).

⁸299 Fed. 468 (1924).

⁹260 U. S. 568 (1923).

azines and tended to create a monopoly. The finding that the contracts substantially lessened competition was adequately supported by the testimony of a number of witnesses, showing that many of the so-called "district agents" of the Curtis Publishing Co. had been wholesalers in the business of distributing magazines before they commenced to handle the Curtis publications; that the contracts entered into by the respondent with the wholesalers contained a provision that the wholesalers should not handle publications of any other publisher without permission from the Curtis Publishing Co.; that in many cases the wholesalers had requested such permission and the respondents refused it; that many wholesalers had been discharged by the respondent because they insisted upon handling competing publications, and their places were filled by new men who would agree to abide by the restrictive clause of the Curtis contracts. But the respondent claimed that the contracts entered into between the Curtis Publishing Co. and the dealers were not contracts of sale, but were contracts of agency and hence not within the provisions of the Clayton Act.

There were two contracts in use. The first was used before the complaint of the Commission was issued; after the complaint the contract was modified. Under the first contract the wholesaler had to remit in advance a sum of money sufficient to prepay the month's supplies and he did not have the right to return unsold copies and get his money back in case he was unsuccessful in selling the specified number of copies. These features of this contract led to its being expressly declared a contract of sale rather than of agency in *Pictorial Review Co. v. Curtis Publishing Co.*¹⁰ The amended contract provided, among other things, that the Curtis Publishing Co. would assign and deliver to the dealer such stock of its publications as the company found that the dealer required; that title should remain with the publisher until the magazines were sold by the dealer; that all sales must be made for cash or at the risk of the dealer; that on sales made the dealer should have a certain commission; and that the dealer should guarantee to sell a specified number of copies. The Commission relied on this evidence to show that the altered contract was in substance, operation and effect the same as the old one and differed from it only in form. The Circuit Court of Appeals, however, set aside the finding of the Commission that it was a contract of sale, and found that it was a contract of agency.¹¹

As to the charges under the Federal Trade Commission Act, the Circuit Court of Appeals reviewed the evidence and itself made additional findings of fact, saying:

"An examination of these findings of fact shows that no findings whatever have been made in reference to greater part of the vast volume of testimony in this case, and it therefore becomes the duty of this court, with a view to giving due effect to such testimony, to here recite what the proofs disclose as to the operations of the defendant company in those matters in which there has

¹⁰255 Fed. 206 (1917).

¹¹270 Fed. 881 (1921).

been no finding of fact by the Commission."

Then the court proceeded to examine at length the facts in the case from the testimony as found in the record and made findings to the effect that the Curtis Publishing Co. had organized a very extensive and beneficial sales system, giving numerous school boys an opportunity to earn some money without interfering with their school work, etc. The court concluded that the respondent was justified in maintaining its exclusive contracts, in order to prevent competitors from undermining the valuable and elaborate system of distribution, and hence that there was no violation of Section 5 of the Trade Commission Act.

This decision was affirmed upon appeal to the United States Supreme Court.¹² Mr. Justice McReynolds, speaking for the court, said:

"Manifestly the court must inquire whether the Commissioners' findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony and proceedings, a decree affirming, modifying, or setting aside an order, the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be remanded to the Commission—the primary fact-finding body—with direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay, the court has full power under the statute to do so."

The court thus held that while the findings of the Commission were conclusive, the court could find "additional facts". In expressing doubt as to this view, Mr. Chief Justice Taft, with whom Mr. Justice Brandeis concurred, said:

"If this means that where it clearly appears that there is no substantial evidence to support additional findings necessary to justify the order of the Commission complained of, the court need not remand the case for further proceedings, I concur in it. It is because it may bear the construction that the court has discretion to sum up the evidence pro and con on issues decided by the Commission and make itself the fact-finding body, that I venture with deference to question its wisdom and correctness. I think it of high importance that we should scrupulously comply with the evident intention of Congress that the F. T. C. be made the fact-finding body and that the court should in its rulings preserve the board's character as such, and not interject its views of the facts where there is any conflict in the evidence."

¹²260 U. S. 568 (1923).

In *Standard Oil Co. of N. Y. v. Federal Trade Commission*, and *Texas Co. v. Federal Trade Commission*,¹³ it was charged that the respondents had violated Section 3 of the Clayton Act by leasing oil tanks and gasoline pumps below cost with the agreement that the dealers should not use the equipment for the gasoline of competitors. The Commission found as a fact that the restrictive covenant in the lease tended to substantially lessen competition and to create a monopoly. In support of such finding the Commission produced testimony to show that the business of most dealers did not warrant the use of more than one pump, thus limiting such dealers to the gasoline of one company; that Standard Oil of New York, alone, in such a manner monopolized 8,000 dealers; that the same situation existed with lubricating and illuminating oils; and that the Standard Oil Co. of New York had already obtained a practical monopoly in Vermont and New Hampshire. The court reversed the order of the Commission, simply stating "the leases of these petitioners do not violate Section 3 of the Clayton Act"—thus holding, in effect, that the leases did not substantially lessen competition or tend to create a monopoly. To the same effect are *Standard Oil Co. v. Federal Trade Commission*, *Gulf Refining Co. v. Federal Trade Commission*, and *Maloney Oil Mfg. Co. v. Federal Trade Commission*.¹⁴

In *International Shoe Co. v. Federal Trade Commission*¹⁵ the respondent was charged with a violation of Section 7 of the Clayton Act.¹⁶ The Commission found as a fact that the products of the two shoe companies had been in substantial competition with one another. The Circuit Court of Appeals sustained the findings, but the Supreme Court, citing with approval the rule of the Curtis case, reversed the Commission's order that the respondent divest itself of the stock of the McElwain Shoe Company, and held that the finding was not supported by the evidence. The Commission adduced testimony showing, among other things, that in Missouri where, in 1921, the petitioner sold its product to 4,801 of the 5,150 retail shoe dealers, the McElwain Company sold in the same year, 25,669 dozen pairs of shoes; that the petitioner sold its shoes to every retailer in Kentucky, Tennessee and Texas, and the McElwain Company sold 8,791 dozen pairs of shoes in the same territory; that petitioner sold to three retail dealers in every four in Illinois, and the McElwain Company sold 27,547 dozen pairs of shoes to independent jobbers, retailers and wholesalers in that state; that in California, where the petitioner sold to seven retailers in every ten, the McElwain Company sold 11,586 dozen pairs of shoes to retailers, independent jobbers and wholesalers. The court,

¹³273 Fed. 478 (1921).

¹⁴282 Fed. 81 (1922).

¹⁵280 U. S. 291 (1930).

¹⁶"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 15 U. S. C. § 18.

however, "upon a careful review of the record" thought the evidence required a contrary conclusion to that given it by the Commission, saying that because of differences in appearance and workmanship the product of the two shoe companies appealed to a different class of consumer and that hence there was no substantial competition in fact. Mr. Justice Stone, in a strong dissenting opinion, concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, said:

"* * * * there appears to me to be abundant evidence that the competitive products made by two of the largest shoe manufacturers in the world, reached the same local communities through different agencies of distribution; the one of petitioner, through sales directly to retailers throughout the United States, the other, of the McElwain Co., through sales in thirty-eight states, chiefly to wholesalers located in cities, who in turn sold to the retail trade. From detailed evidence of this type the Commission drew, as I think it reasonably might, the inference that the rival products, through local retailers, made their appeal to the same buying public and so were competitive. From a comparative study of the statistics of sales, the Commission might also, I think, reasonably have found that the McElwain Co. was successfully competing, by securing by far the larger proportion of the trade in this type of shoe, its sale of dress shoes in 1920 being more than \$33,000,000 and in 1921 more than \$15,000,000, as compared with petitioner's sales of its similar dress shoes of approximately \$2,500,000."

It remains to be seen what conclusions may be properly drawn, specifically from the cases just discussed and generally from the case law on the subject. It has already been pointed out that there are many cases in which the fact findings of the Commission have been treated as conclusive and its order upheld.¹⁷ It is also true that there are cases where the court's refusal to sustain the Commission's order on the ground that the findings of fact were not supported by the evidence was eminently correct, the *John Bene* case¹⁸ being an example of such an instance. But it is apparent, from a consideration of the cases here presented, that the courts do not, in every instance, confine themselves to a determination of whether there is substantial evidence to support the Commission's findings. There is often a wide range between what the courts say they do and what they actually do.¹⁹ Mention has already been made of the principles and doctrines which purportedly govern and determine the decision of the court, and it may be helpful at this time to point out the application of these principles and doc-

¹⁷See note 4 *supra*.

¹⁸*John Bene & Sons, Inc. v. Federal Trade Commission*, 299 Fed. 468 (1924), cited *supra* note 8.

¹⁹"With much discussion of principle and doctrine and liberal use of the legal terminology of proof, the federal courts have dealt freely with the orders of the Trade Commission." MCFARLAND, *JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND INTERSTATE COMMERCE COMMISSION*, page 34.

trines to the cases just discussed.

The judgment of the Commission as to matters of fact are, by the statute, made conclusive, where supported by testimony, but matters of law are always reviewable by the courts. Congress obviously intended this division of authority between the Commission and the courts.²⁰ As the borderline between matters of law and matters of fact is so often vague and undefined, and law and fact so inextricably mixed, it is apparent that the court is here given considerable scope in reviewing the findings of the Commission and setting its orders aside where the court so desires.²¹ Thus, in the *Curtis* case,²² the court's disposition of the charge under the Clayton Act may be explained on the ground that the question of whether the contracts were those of sale or of agency was treated by the courts as one of law, rather than one of fact, and hence the court properly went into the evidence and gave it its own interpretation.²³ It should be noted in this connection that when the facts in the case have been established, the question whether or not the practice complained of constitutes a violation of the law is ultimately a question for the courts.²⁴ Thus, as illustrated by the *Pearsall Butter Co.* case,²⁵ the construction of a contract, after it is established that it is one of sale, to determine whether it is in violation of the law, is in the final analysis for the courts to decide.

In *L. B. Silver Co. v. Federal Trade Commission*²⁶ the Commission made the finding of fact in question upon the testimony of disinterested persons, including experts, raisers of pure bred hogs, veterinarians, stock buyers, and on statements found in the writings of experts. The court, nevertheless, refused to sustain the Commission's finding on the ground that it was really a finding of opinion, and hence not conclusive. The court appears here to have

²⁰President Wilson recommended the Commission "as a clearing house for the facts".

²¹MCFARLAND, 1933, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION: "Although determinations of fact by the Trade Commission are made conclusive, abstract consideration of the evidence and the treatment of each part of the record of some form of 'question of law' has been the means for substitution of the judgment of courts for the decisions of the Commission * * * so far as the experience of the Interstate Commerce Commission and Federal Trade Commission disclose, the distinction between 'law and fact' neither makes for consistency nor provides a workable separation."

²²Federal Trade Commission v. The Curtis Publishing Co., 260 U. S. 568 (1923) *supra* note 9.

²³"Judged by its terms, we think this contract is one of agency, not of sale upon condition, and the record reveals no surrounding circumstances sufficient to give it a different character." 260 U. S. 568, at 581.

²⁴"The courts hold that since the Trade Commission Act and the Clayton Act do not define such terms as unfair methods of competition and what may substantially lessen competition or tend to create a monopoly, and since the exact meaning of such terms is in dispute, it is for the courts and not for the Commission to determine ultimately their meaning." Tollefson, *Judicial Review of the Decisions of the Federal Trade Commission* (1927) 4 Wis. L. Rev. 257, 281.

²⁵*Pearsall Butter Co. v. Federal Trade Commission*, 292 Fed. 720 (1923) *supra* note 6.

²⁶287 Fed. 985 (1923) *supra* note 7.

found a handy device for circumventing the statute. In the very nature of the case the finding of fact by an administrative agency is often the opinion of that body based on the evidence it has been able to gather.²⁷ If an expert could have reasonably arrived at the findings of fact, as found, upon the basis of the evidence presented, it would seem that the Commission has acted within the scope of the statute as intended by Congress. It should make no difference that the court upon a consideration of the same evidence would make a different finding of fact. Thus, in the instant case there was ample testimony to support the finding of the Commission that the respondent's hogs were not a separate breed. The evidence pro and con was for the Commission to consider, and if, in its discretion, it chose to accept the testimony of one group of experts rather than that of the other group, its findings should, nevertheless, have been sustained. Another example of the court's use of this device is found in the opinion of the Circuit Court of Appeals in *Raladam Co. v. Federal Trade Commission*,²⁸ the court holding that the Commission's finding that Marmola was "unsafe and unscientific" was merely a statement of opinion.²⁹ The Supreme Court,³⁰ in upholding the Circuit Court of Appeals chose to do so, however, on other grounds, *i. e.*, that there was no showing of injury to competitors.

*Federal Trade Commission v. The Curtis Publishing Co.*³¹ may well be considered the leading case. As we have already seen, the court in that case held that as Section 5 of the Trade Commission Act grants jurisdiction to make and enter upon the pleadings, testimony and proceedings a decree affirming, modifying or setting aside, the order of the Commission, the court has the power to examine the whole record and to consider not only the facts found by the Commission, but also the proofs which the Commission took, but upon which it made no findings—*i. e.*, that the court may make additional fact findings upon which to base its decision. This interpretation of the statute, making the court as well as the Commission a fact-finding body and making the Commission the "primary" fact-finding body merely, is in utter disregard of the evident intent of Congress, for the Commission's findings, though supported by evidence, cannot be conclusive if the court may find and rest its judgment on other facts. This doctrine of "other facts" has been applied in subsequent cases³² and affords an easy

²⁷"The difficulty in the relation of courts to administrative agencies is enhanced by the peculiar character of administrative findings of fact. The dispute usually does not turn upon the truth or falsity of the facts established by the Commission, but upon the truth or falsity of its conclusions, *i. e.*, either the completeness of the facts to serve as a basis of judgment, or their interpretation and effect. These conclusions must in the nature of things be largely matters of opinion, and the difference between law and fact becomes obscure." FREUND, HISTORICAL SURVEY IN GROWTH OF AMERICAN ADMINISTRATIVE LAW (1923), page 32.

²⁸42 F. (2d) 430 (1930).

²⁹At pages 432-435.

³⁰283 U. S. 643 (1931).

³¹260 U. S. 468 (1923), *supra* note 9.

³²James S. Kirk Co. v. Federal Trade Commission, 59 F. (2d) 179 (1932); Federal Trade Commission v. Paramount Famous-Lasky Corp.,

way out for the court where it feels it desirable to set aside the order of the Commission.

The *Gasoline Pump* cases³³ and the *International Shoe Co.* case³⁴ are illustrative of the fact that the court, on occasions, completely ignores the statute and simply declares that the findings of fact made by the Commission are wrong. These cases certainly cannot be reconciled with the general law as to the findings of fact by administrative bodies. In the *Gasoline Pump* case there was evidence to show that the contracts did substantially lessen competition and tend to create a monopoly. The court, however, went into the evidence and substituted its opinion for the conclusion of the Commission.

The authority of administrative bodies depends, generally, upon the statutes which create them or define their powers. The action of an administrative agency must be within the scope of the authority conferred by law, and the acts of such an agency are void where it acts without jurisdiction. For this reason the Commission cannot be the final arbiter of its own jurisdiction, and administrative determinations of jurisdiction are reviewable by the courts. Hence, findings of fact which furnish the basis of the Commission's jurisdiction are not conclusive and it is for the courts and not for the Commission ultimately to determine what constitutes unfair methods of competition.³⁵ The doctrine of "jurisdictional facts" puts a necessary and legitimate limitation upon the fact-finding power of administrative bodies. No criticism can fairly be made so long as its use is confined to preventing the administrative tribunal from exercising powers greater than those delegated to it by the legislature.

The Supreme Court announced, in the case of *Crowell v. Benson*,³⁶ a doctrine of "constitutional fact" which possibly may be applied to cases involving the Federal Trade Commission and used by the courts to set aside the orders of that body. In that case it was held that with respect to the review of an award made by a deputy commissioner under the Federal Longshoremen's and Harbor Workers' Compensation Act that the petitioner was entitled to a hearing *de novo* in a federal court and an independent judicial determination of the questions of the existence of the relation of master and servant and whether the injury took place on navigable waters—*i. e.*, facts upon the existence of which the constitutional power of Congress to legislate in the matter depended. Thus, if "fundamental rights" depend upon the facts, there is no administrative finality as to those facts. It has been suggested by Professor John Dickinson that almost any question in the field of government regulation could be translated into a question of constitutional right under the language of *Crowell v. Benson*, so as to require independent jurisdictional determination.³⁷ However, there are numer-

57 F. (2d) 152 (1932).

³³Standard Oil Co. of N. Y. v. Federal Trade Commission, and Texas Co. v. Federal Trade Commission, 273 Fed. 473 (1921), *supra* note 13.

³⁴280 U. S. 291 (1930), *supra* note 15.

³⁵Federal Trade Commission v. Gratz, 257 U. S. 421 (1920).

³⁶285 U. S. 22 (1932).

³⁷Dickinson, *Crowell v. Benson*; *Judicial Review of Administrative*

ous cases upholding administrative finality in other fields, wherein it can be said with equal force that constitutional rights are at stake and it is thought that the rule laid down in the *Crowell* case is not apt to be extended to cover situations other than those to which it has already been applied³⁸—i. e., the situations as found in the *Crowell* case and to a review of rate orders of public service bodies.³⁹ The doctrine remains, however, a potential weapon for the court's use.

The Commission, in its investigations, is not bound, as are courts, to the general rules as to the admissibility of evidence.⁴⁰ The Commission has, generally, been allowed a wide discretion in the admission or exclusion of evidence.⁴¹ But while the Commission is not restricted to the taking of legally competent and relevant testimony or evidence, it seems that the kind of evidence that should be admitted and the competency of a witness is ultimately for the courts to pass upon in the absence of other substantial evidence.⁴² However, the relative weight of the evidence and the credibility of the testimony is, supposedly, a matter for the Trade Commission alone to decide.⁴³ It was held in the *International Shoe Co.* case *supra*, however, that the Commission was bound to accept the statements of the officers of the respondent to the effect that there was no real competition in respect to particular products where no reason appeared for doubting their accuracy of observation or credibility, illustrating the fact that in spite of the lip-service they may pay to the rule, the courts do not hesitate on occasion to determine for themselves the weight of the evidence.

There seems to be a tendency on the part of the courts of late years to give more weight to the findings of the Commission and to permit the scope of its activities to be widened. This tendency was foreshadowed by the vigorous minority opinion of Chief Justice Taft in the *Curtis* case.⁴⁴ In *Moir v. Federal Trade Commis-*

Determination of Questions of Constitutional Fact (1932) 80 U. OF PA. L. REV. 1055, 1077.

³⁸Comment (1937) 25 CALIF. L. REV. 315-321.

³⁹*St. Joseph Stock Yards Company v. U. S.* 298 U. S. 38 (1936); Note (1936) 50 KAN. L. REV. 78; and *Baltimore & Ohio Ry. Co. v. U. S.*, 298 U. S. 349 (1936).

It is believed that the majority opinion in the *Crowell* case based the requirement of a judicial trial *de novo* as to "fundamental" or "jurisdictional" facts in that case upon the judiciary article, Article III, of the U. S. Constitution. Comment (1933) 21 CALIF. L. REV. 266.

⁴⁰Wigmore, *Administrative Board Rules* (1922) 17 ILL. L. REV. 263; WIGMORE, EVIDENCE (2d ed. 1923), p. 27.

⁴¹"The weight of authority is that the acceptance or exclusion of such testimony is a matter of discretion." *Federal Trade Commission v. Good Grape Co.*, 45 F. (2d) 70, 72 (1930).

⁴²*John Bene & Sons v. Federal Trade Commission*, 299 Fed. 468 (1924); *Hill Bros. v. Federal Trade Commission*, 9 F. (2d) 481 (1926); *Ark. Wholesale Grocers' Assn. v. Federal Trade Commission*, 18 F. (2d) 866 (1927).

⁴³*Cream of Wheat Co. v. Federal Trade Commission*, 14 F. (2d) 40 (1926); *Federal Trade Commission v. Good Grape Co.*, 45 F. (2d) 70 (1930); *Wholesale Grocers' Assn. v. Federal Trade Commission*, 277 Fed. 657 (1922).

⁴⁴But compare: "Nevertheless this 'doubt' and cautionary concurring opinion has not stayed actual practice. From the beginning the courts

sion,⁴⁵ decided in 1926, the court quoted with approval from the opinion of doubt of Chief Justice Taft in the *Curtis* case, to the effect that the character of the Commission should be preserved as the fact-finding body and that the court should not interject its views where there is any conflict in the evidence. In the *Hill Bros.*⁴⁶ and *Arkansas Wholesale Grocers' Association* cases,⁴⁷ decided in 1926 and 1927, respectively, there are strong statements to the effect that the courts should confine themselves to questions of whether the findings are supported by substantial evidence and that they should not go beyond this to weigh the evidence or review the findings of fact found by the Commission. In *Pacific States Paper Trade Assn. v. Federal Trade Commission*,⁴⁸ decided in 1927, the Supreme Court announced that the "weight to be given to the facts and circumstances, * * * as well as the inferences reasonably to be drawn from them is for the Commission," and while, as we have seen, the court has not followed this rule in the past and subsequently departed from it in the *International Shoe Co.* case,⁴⁹ decided in 1930, the latter case contained a strong dissent by Justice Stone, concurred in by Justices Holmes and Brandeis. The significance of this dissent is that it indicates the strong and fixed opinion of the then minority membership of the Supreme Court, and it is quite possible that this view is now, as a result of the recent changes in the personnel of our highest tribunal, the rule of the court itself. In the case of the *Algona Lumber Co. v. Federal Trade Commission*,⁵⁰ the Circuit Court of Appeals for the Ninth Circuit weighed the evidence and then declared that there was none to support the conclusions reached. The Supreme Court,⁵¹ in reversing the decision and reprimanding the lower court for merely paying "lip-service" to the words of the statute, said:

"What the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and Decision forbid that exercise of power."

The latest enunciation of the Supreme Court on this subject is in the case of the *Federal Trade Commission v. Standard Education Soc.*,⁵² decided in 1937, in which the court reversed the Circuit Court of Appeals in order to sustain the findings of the Commission that respondent's practice in furthering sales of its products was "unfair, false, deceptive and misleading". Mr. Justice Black, speaking for the court, said:

"The courts cannot pick and choose bits of evidence to

have determined the weight of the evidence and have substituted their judgment for the conclusions of the Commission." MCFARLAND, JUDICIAL CONTROL OF FEDERAL TRADE COMMISSION AND INTERSTATE COMMERCE COMMISSION, page 33.

⁴⁵12 F. (2d) 22 (1926).

⁴⁶Hill Bros. v. Federal Trade Commission. 9 F. (2d) 481 (1926).

⁴⁷Arkansas Wholesale Grocers' Assn. v. Federal Trade Commission, 18 F. (2d) 866 (1927).

⁴⁸273 U. S. 52, 63 (1927).

⁴⁹280 U. S. 291 (1930).

⁵⁰64 F. (2d) 618 (1937).

⁵¹291 U. S. 67 (1934).

⁵²302 U. S. 112 (1937).

make findings of fact contrary to the findings of the Commission.”

This is probably the court's strongest unqualified statement on the finality of the Commission's fact finding.⁵³ The Supreme Court, in 1934, expressly recognized for the first time, that the Commission is a board of experts, when Mr. Justice Stone, speaking for the court in *Federal Trade Commission v. Keppel*,⁵⁴ acknowledged that the Trade Commission “was created with the avowed purpose of lodging the administrative functions committed to it in ‘a body specially competent to deal with them by reasons of information, experience and careful study of the business and economic conditions of the industry affected’, and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would ‘give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience’.” These cases indicate quite clearly that the courts are taking a more sympathetic view of the Commission's work than they formerly did—largely because the Commission is becoming more experienced and efficient and is apparently taking greater care to fulfill the requirements of due process of law. All signs indicate that in the future the court will be much less prone to go beyond a determination of whether there is substantial evidence to support the findings. In the recent case of *Morgan v. United States*⁵⁵ one of the allegations of error was that the order of the Secretary of Agriculture fixing maximum rates for livestock sales commissions at the Kansas City stockyards was arbitrary and unsupported by substantial evidence. The Supreme Court, however, without mentioning this point, decided for the petitioner by declaring that there had not been a compliance with the requirements of a fair and open hearing. This might be deemed to indicate that the court in the future will give due weight to the fact findings of administrative tribunals where supported by evidence, and will safeguard the citizen from abuse of administrative process by requiring a strict observance of the requirements of a fair and open hearing.

It has been shown that the provisions of the Trade Commission Act and the Clayton Act that “the findings of the Commission as to facts, if supported by testimony, shall be conclusive” has been honored by the courts almost as much in the breach as in the observance. When a court is unconvinced by the findings of the Commission it has little difficulty in evading the statute where it deems that desirable. It need simply find that it is a question of “law” and not of “fact”, or a matter of “opinion”, or the court may find “other facts” or determine for itself as to “jurisdictional” or “constitutional” facts. Indeed, in many cases the court has merely declared that in fact there was no evidence to support the findings. As a result it cannot be said that any matters can be, in all events, conclusively determined by the Commission, for even

⁵³See 5 U. OF CHI. L. REV. 495.

⁵⁴291 U. S. 304 (1934).

⁵⁵304 U. S. 1.

as to findings involving chiefly questions of physical fact the courts have gone back of the findings of the Commission. Nevertheless, though the provisions of the statute have been frequently nullified in practice, it may be said that in the majority of instances the findings of the Commission were given due weight and certainly this is true of the later cases, the courts seeming much more prone than formerly to consider the fact findings of the Commission a sufficient basis for orders. In conclusion, it cannot be said that the case material to date can be reconciled or reduced to a logical system. The courts seem to have exercised a wide and almost unpredictable freedom in reviewing the findings of fact of the Trade Commission.

WILLIAM G. DANIELS.