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Administrative Law -- 1956 Tennessee Survey

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ADMINISTRATIVE LAW—1956 TENNESSEE SURVEY

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Questions of the scope and timing of judicial review of administrative agency action were again before the courts during the period covered by this survey.

Timing of Judicial Review: The problem of "timing" of judicial review of administrative action includes questions of the availability of administrative remedies and whether their exhaustion must be required before court action; ripeness for review, usually associated with the issuance of agency rules and regulations; and jurisdictional questions vis-à-vis the agency and the court.

The latter question may be referred to in terms of "primary jurisdiction" or as "exclusive administrative jurisdiction," "prior resort," or "prelimmary resort."[1] The primary jurisdiction doctrine refers to the question whether the administrative agency has jurisdiction initially to consider a matter to the exclusion of the courts. The doctrine was formulated in the case of *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*[2] There Abilene was attempting to recover reparation for alleged shipping overcharges. Notwithstanding that the Interstate Commerce Act provided that suits to recover such overcharges might be brought in federal courts, the Supreme Court found that overbearing considerations of uniformity in the application of the act required that shippers seeking reparation must "primarily invoke redress through the Interstate Commerce Commission." The application of the doctrine is usually explained on the basis that the legislature, having created a body of special expertness and experience, may require that certain matters be initially resolved by that body.[3]

In *Breeden v. Southern Bell Tel. & Tel. Co.*,[4] citizens of Jefferson

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1. See DAVIS, ADMINISTRATIVE LAW 664 (1951).
2. 204 U.S. 426 (1907).
3. Among federal agencies, in addition to the Interstate Commerce Commission, the doctrine of primary jurisdiction has been applied to some matters within the ambit of such agencies as the Federal Maritime Board, Far East Conference v. United States, 342 U.S. 570 (1952); the Civil Aeronautics Board, Lichten v. Eastern Airlines, 189 F.2d 939 (2d Cir. 1951); the National Labor Relations Board, Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940); and the National R.R. Adjustment Bd., Slocum v. Delaware, L. & W.R.R., 339 U.S. 239 (1950).
4. 285 S.W.2d 346 (Tenn. 1955).

County sought by injunction to compel the telephone company to extend service to a particular area within the county and sought to recover the statutory penalty for failure to provide service.[5] The Code,[6] then section 5451 of Williams Tennessee Code, authorizes the Railroad and Public Utilities Commission to require, after notice and hearing, public utilities to make reasonable extensions of service. The Tennessee Supreme Court, comparing what was sought in this case to the regulation of service and rates of common carriers, held that the action of the Commission must first be obtained in order to require such an extension of service. In the light of the reasons for applying the primary jurisdiction doctrine, *i.e.*, the familiarity of the agency with the special problems and procedures of the utility, the result is practical as well as fair,[7] particularly in the case of such a well-established agency as this Commission.

A similar result was reached in *Kingsport Util. v. Steadman*,[8] which involved condemnation of land by a public utility. There the federal district court said that determination, under section 65-2201 of the Tennessee Code Annotated, of what is "necessary or advisable" in the way of land to be condemned for a public purpose is an "administrative" rather than a judicial question. Of course, in such a situation the utility itself may be exercising the administrative authority.

Another aspect of timing of judicial review of agency action is the sometimes requirement that administrative remedies be exhausted before the aid of the court is sought.[9] This rule was applied in *State ex rel. Jones v. Nashville*.[10] In that case a former employee of the city sought by mandamus to require restoration to his former civil service position. It appeared, however, that the petitioner had rested on his rights and had failed to take the administrative appeal provided by the regulations within the time provided, so that there was, in fact, no further administrative remedy which he might exhaust. At first blush the application of the rule to such a situation might appear anomalous. Not so, however, when it is considered that one of the prime reasons for applying the rule in any case is that the agency is in a better position than the court from the standpoint of gathering and understanding the evidence and, as the court states, "ordinarily men in administering that position can be and should be presumed to do the correct thing and if given a full chance to fully

5. TENN. CODE ANN. § 65-2111 (1956).
6. TENN. CODE ANN. § 65-414 (1956).
7. The primary jurisdiction doctrine has been justly criticized when applied to some situations. See, *e.g.*, Schwartz, *Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 GEO. L.J. 495 (1953).
8. 139 F. Supp. 622 (E.D. Tenn. 1956).
9. See DAVIS, ADMINISTRATIVE LAW 614 (1951); Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939); Stason, *Timing of Judicial Redress from Erroneous Administrative Action*, 25 MINN. L. REV. 560 (1941).
10. 279 S.W.2d 267 (Tenn. 1955).

pass upon the matter they will determine it correctly."[11] So a litigant who, by his own fault, has failed to exhaust his administrative remedies may be left where he placed himself.[12]

It was urged in this case that it probably would have been futile to take the administrative appeal. The court answered that contention, citing a leading case from California,[13] by stating that the mere fact that the administrative authorities might deny relief is no ground for asserting the futility of the administrative action. This statement is tempered by the inference made that in cases of "absolute futility" exhaustion might not be required.

Scope of Judicial Review: Tennessee has normally applied the "substantial evidence" rule to judicial review of most findings of fact by administrative agencies.[14] That is, ordinary determinations of fact, if supported by substantial evidence in the record, will not be overturned by the court. The leading recent Tennessee case on this point is *Hoover Motor Express Co. v. Railroad & Pub. Util. Comm'n,*[15] which is frequently pointed out by the supreme court as stating the present scope of review of agency fact determinations.

The *Hoover* case was referred to and its doctrine applied in *Continental Tennessee Lines v. Fowler.*[16] Involved in the *Continental* case was the revocation of a certificate of convenience and necessity to operate a section of a bus line because of abandonment by the motor carrier.[17] The supreme court found that there was substantial or material evidence to support the determination of the Public Service Commission and affirmed the decree of the chancellor upholding the Commission.[18]

An important area of scope of judicial review appears to have been carved out of such cases as the *Hoover* case in *Southern Continental Tel. Co. v. Railroad & Pub. Util. Comm'n.*[19] At least since 1920 there has existed a narrowing area of cases in which the scope of judicial review of agency action is considerably broader than in the "ordinary" case. These are cases of rate-making by agencies where a denial of

11. 279 S.W.2d at 268.
12. See also Lichter v. United States, 334 U.S. 742 (1948).
13. Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 109 P.2d 942, 132 A.L.R. 715 (1941). *Cf.* City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934).
14. See discussion in Sanders, *Administrative Law—1955 Tennessee Survey,* 8 VAND. L. REV. 940, 945 (1955); Sanders, *Administrative Law—1954 Tennessee Survey,* 7 VAND. L. REV. 733, 741 (1954); Lacey, *Judicial Review of Administrative Action in Tennessee—Scope of Review,* 23 TENN. L. REV. 349 (1954).
15. 195 Tenn. 593, 261 S.W.2d 233 (1953).
16. 287 S.W.2d 22 (Tenn. 1956).
17. See TENN. CODE ANN. § 65-1514 (1956).
18. See also Presson v. Benton County Beer Bd., 281 S.W.2d 63 (Tenn. 1955), indicating a more restricted scope of review over actions by some agencies.
19. 285 S.W.2d 115 (Tenn. 1955).

due process, under the fourteenth amendment to the United States Constitution, by confiscation is alleged. *Ohio Valley Water Co. v. Ben Avon Borough*[20] constitutes the headwaters of this stream. In that case a Pennsylvania statute which was construed as denying to the courts in rate-making cases the power to exercise an independent judgment on the question of confiscation was held to be violative of the due process clause. The *Ben Avon* decision was followed in, but its impact modified somewhat by, *St. Joseph Stock Yards Co. v. United States*[21] where the Court stated that "Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency."[22] The *Ben Avon* and *St. Joseph* cases have not been overruled, although commentators extract considerable authority from later cases to indicate that the stream has pretty well petered out.[23]

On rehearing of the *Southern Continental* case, the Tennessee Supreme Court felt itself bound by the decision of the United States Supreme Court in the *Ben Avon* case on the question of scope of review of alleged confiscation in rate-making cases and reversed its prior inconsistent (unpublished) holding.

The final disposition of this case by the court, however, leads to the conclusion that the modification contained in the *St. Joseph* case, that independent judicial evaluation may be exercised on the basis of the evidence already in the record, is the keystone of the opinion. For the Court stated, "This decision [*St. Joseph Stock Yards Co. v. United States*] of the United States Supreme Court is likewise conclusive here. Hence, since the Chancellor gave no consideration to the Commission's Exhibit B, it is necessary, in any view of the matter, to remand the case for further consideration by the Chancellor to the end that findings and conclusions in accordance with the independent judgment of the Chancellor guided by the rules herein stated shall be decreed."[24] This view of the case leads to the belief that the exercise of the "independent judgment of the court" required by the *Ben Avon* case may be satisfied in Tennessee by a review to ascertain if there is "substantial evidence" in the record as a whole to support the agency determination,[25] without the necessity of allowing a trial de novo.

Other administrative law cases during the period of the survey

20. 253 U.S. 287 (1920).
21. 298 U.S. 38 (1936).
22. *Id.* at 53.
23. See, *e.g.*, DAVIS, ADMINISTRATIVE LAW 919 (1951); Benjamin, *Judicial Review of Administrative Adjudication*, 48 COLUM. L. REV. 1, 19 (1948). And see also Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951), not, however, involving rate-making. For a contrary view, see Opinion of the Justices, 328 Mass. 679, 106 N.E.2d 259 (1952).
24. 285 S.W.2d at 117.
25. On the "whole record" aspect, see Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

considered questions of the standing of private citizens to obtain a hearing on an application for a beer permit;[26] the application of the Teacher Tenure Act of 1951,[27] which was held not to be retrospective in its operation;[28] and the jurisdiction of the State Board of Claims[29] to hear a damage action arising from the actions of a drunken prisoner driving a state truck.[30]

26. Manuel v. Eckel, 285 S.W.2d 360 (Tenn. 1955) (standing was denied).
27. TENN. CODE ANN. § 49-1401 (1956).
28. Shannon v. Board of Education, 286 S.W.2d 571 (Tenn. 1955).
29. TENN. CODE ANN. § 9-801 (1956).
30. Hill v. Beeler, 286 S.W.2d 868 (Tenn. 1956).