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ADMINISTRATIVE LAW

by

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THE PAST year witnessed few cases of major importance in the development of administrative law. A greater number of cases of some interest were decided, of course, the more significant of which are included in this *Survey*.

I. CONSTITUTIONAL RIGHT TO NOTICE AND HEARING

Notice. *City of Houston v. Fore*,[1] referred to in last year's *Survey*,[2] was affirmed by the Texas Supreme Court. The supreme court agreed with the court of civil appeals[3] that a hearing to determine a special property assessment could not be administratively determined with only constructive notice to the land owners, when their names and addresses were known to the city.[4] This decision, predicated upon the procedural due process requirement of the fourteenth amendment, is parallel to the position recently assumed by the United States Supreme Court.[5] The state court noted that a distinction should be drawn between statutory assessment formulas and administratively determined special assessments, the former requiring no notice or hearing.

Hearing. In *City of Houston v. Fore*[6] the supreme court held that under certain conditions constructive notice is insufficient where a municipality levies assessments against property. The court also held that there is no constitutional right to a hearing prior to special assessment for a paving improvement if the state legislature fixed the assessment. But, if it delegates the establishment of the assessment to a municipality, a hearing is necessary. This follows generally accepted constitutional principles and restates the law as established in the early Texas case of *Hutcheson v. Storrie*.[7]

II. CONSTITUTIONAL LIMITATION ON STATUTORY AUTHORITY

An applicant who failed to pass an examination required of polygraph

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[1] 412 S.W.2d 35 (Tex. 1967). For further discussion, see Wingo, *Municipal Corporations*, this *Survey*, at footnote 36.

[2] FitzGerald, *Administrative Law, Annual Survey of Texas Law*, 21 Sw. L.J. 199, 205 (1967).

[3] 401 S.W.2d 921 (Tex. Civ. App. 1966).

[4] The defendant-owner of the land had resided at the address for twenty-seven years, his name and address were on the city tax rolls, and the city had written him at that address in prior years.

[5] Schroeder v. City of New York, 371 U.S. 208 (1962). *See also* three United States Supreme Court cases which the court cited in *Fore*: Wisconsin Elec. Power Co. v. City of Milwaukee, 352 U.S. 948 (1956); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[6] 412 S.W.2d 35 (Tex. 1967); *see* text accompanying note 2 *supra*.

[7] 92 Tex. 685, 51 S.W. 848 (1899).

operators under the new Texas Polygraph Examiners Act[8] contended the statute was in violation of article I, section 16 of the Texas Constitution since it impaired the obligations of valid and subsisting contracts which the applicant held on the date of the statute's enactment. In *Dovalina v. Albert*[9] the court of civil appeals held that the statute's effect on the applicant's existing contracts was only incidental. The court reasoned that the statute was valid because it only required polygraph operators to possess minimum skills so that deception and distortion could be detected. Thus the statute was a valid exercise of the police power of the state.

III. ADJUDICATION

Right To Be Advised of Nature of Claim. Before they may impose administrative sanctions, administrative tribunals whose statutes require notice and hearing must be precise in the notice given of the charges preferred. In *City of San Antonio v. Poulos*[10] this problem was presented when a city detective was discharged for failure to report information concerning a gun allegedly stolen by a third party. The city charged that the detective violated city personnel rules[11] by failing to report the information. In a five-to-four decision the Texas Supreme Court refused to uphold the city's action. The court held that the detective had been given inadequate notice and that the facts charged should have specifically referred to the rule claimed to have been violated. The dissenting justices protested that the majority demanded from the administrative agency all of the technicalities of an indictment.

Compelling Testimony—Subpoena Power. On a motion for rehearing in *Gerst v. Nixon*[12] the contention was made that the appellant was denied due process of law because the Savings and Loan Act[13] failed to confer authority upon the Savings and Loan Commissioner to issue subpoenas or to compel testimony. The supreme court declined to pass upon the question directly, denying the motion for lack of a showing of prejudice. Authority exists on both sides of the question but the majority of jurisdictions find no denial of due process merely because of the absence of subpoena power. This may be attributable in part to the absence of a showing of prejudice in particular cases.[14]

Right to a Hearing. The Supreme Court of Texas in a five-to-four de-

[8] TEX. REV. CIV. STAT. ANN. art. 2615f-2 (1965).
[9] 409 S.W.2d 616 (Tex. Civ. App. 1966) *error ref. n.r.e.*
[10] 11 Tex. Sup. Ct. J. 83 (1967).
[11] The rules allegedly violated provided that (1) an officer must report all information he may receive about any violation or suspected violation; (2) the officer must give information regarding any filing; and (3) an officer shall not wilfully misrepresent any matter, or sign any false statement or report. Because of the alleged violations the detective was discharged under a rule which provided for discharge for violation of the rules and regulations of the department.
[12] 411 S.W.2d 350 (Tex. 1966).
[13] TEX. REV. CIV. STAT. ANN. art. 852(a) (1964).
[14] Brinkley v. Hassig, 130 Kan. 874, 289 P. 64 (1930); *see* 1 F. COOPER, STATE ADMINISTRATIVE LAW 313-16 (1965).

cision held that competing carriers are entitled to be heard by the Railroad Commission on the issue of whether a certified carrier applying to sell its certificate has permitted its regulated business to become dormant.[15] The court based its decision upon a reconciliation of the transfer provisions[16] of the motor carrier law with the revocation and complaint provisions.[17] The court rejected the Commission's contention that its long-standing practice was to handle dormancy (revocation) matters separately and that it had the discretion to do so. It left undisturbed the rule of previous decisions that the question of "public convenience and necessity" was not an appropriate consideration in a transfer hearing. The dissenting members of the court agreed with the Commission's contentions and said that (1) to add a dormancy issue in a transfer proceeding would, in effect, introduce the question of public convenience and necessity, (2) the majority were intruding upon the Commission's discretion to weigh complaints and determine when to institute revocation proceedings, and (3) the obvious result will be to permit competitors to delay indefinitely the processing of transfer applications. The last point seems to be the real issue between the majority and minority views, and is not a judicial question in the absolute sense: it is a legislative question. The majority view seems correct. Questions of public interest are clearly contemplated for Commission consideration under the transfer section of the law. If protestants raise substantial public interest questions with adequate specificity and verification the Act also contemplates that something should be done. It would seem that the Commission can prevent undue prolongation of transfer proceedings by requiring specificity and substance in the presentation of complaints. This requirement would help preserve the Commission's administrative discretion in ordering its business and otherwise carrying out its functions, while respecting the court's insistence on preventing possible arbitrary administrative action.

The decision, however, contains elements of judicial superintendence. The court pointed out that, by custom, transfer approvals were conditioned upon the certificate transferred being in "good standing" and not subject to cancellation, thus in a sense hoisting the Commission by its own procedures. The court went further, however, and called it "unconscionable" for the Commission to collect ten per cent of the transfer price, as the law provides it shall, "and later determine that the transfer which it had approved was of invalid certificates."[18]

Judicial Hearing. A transportation company's self-insurance certificate was cancelled by the Texas Department of Public Safety under the Texas Motor Vehicle Safety-Responsibility Act.[19] Though the statutes provided for a notice and hearing, none was given. The trial court tried the case

[15] Brown Express, Inc. v. Railroad Comm'n, 415 S.W.2d 394 (Tex. 1967).
[16] TEX. REV. CIV. STAT. ANN. art. 911(b), § 5 (1964).
[17] *Id.* § 12(4).
[18] 415 S.W.2d 394, 398 (Tex. 1967).
[19] TEX. REV. CIV. STAT. ANN. art. 6701h (1967).

de novo on appeal and concluded that the Department action was invalid for failure to comply with the statute as well as failure to obtain evidence constituting reasonable grounds for the cancellation as required by statute. A court of civil appeals in *Texas Dept. of Public Safety v. Banks Transp. Co.*[20] affirmed. It said, however, that the facts before the Department were immaterial, the appeal being de novo. The court could take evidence and determine what constituted reasonable grounds for cancellation. A judicial hearing was thus substituted for the administrative hearing provided by statute. The case finds precedent in such cases as *Jordan v. American Eagle Fire Insurance Co.*[21]

Evidence. The Savings and Loan Commissioner, after hearing, denied Gibraltar's application to open a branch office in Houston on the basis of three unfavorable findings: (a) inadequate showing of public need, (b) inadequate showing of prospective profitable operation, and, (c) potentiality of undue harm to competitors. The Commissioner did not consider an affidavit attesting to the public need for the branch office, though the affidavit was a part of the administrative record. The district court reversed and remanded, holding that there was no substantial evidence supporting the Commissioner's action. The court of civil appeals[22] held that (1) the Commissioner acted correctly in not taking the *ex parte* affidavit into consideration, and (2) the court on appeal could not consider the testimony given in the trial court by the affiant since, under the recent decision in *Gerst v. Nixon*,[23] judicial review is limited under the Savings and Loan Act to the administrative record.[24] The court of civil appeals remanded to the Commissioner. It concluded a remand would serve the cause of justice, since the Savings and Loan Act[25] had been substantially revised after the start of the proceeding and uncertainties in the law had been settled by the supreme court in *Nixon*.

The Texas Supreme Court, in a per curiam opinion,[26] refused, n.r.e., an application for writ of error. The supreme court approved the court of civil appeals' determination that there was substantial evidence reasonably to support the Commissioner's finding of no public need for the branch office applied for by the Association. The court expressed agreement with conclusions (1) and (2) of the court of appeals, but, on

[20] 417 S.W.2d 754 (Tex. Civ. App. 1967) *error granted.*

[21] 169 F.2d 281 (D.C. Cir. 1948).

[22] Gerst v. Gibraltar Sav. Ass'n, 413 S.W.2d 718 (Tex. Civ. App.), *aff'd per curiam*, 417 S.W.2d 584 (1967).

[23] 411 S.W.2d 350 (Tex. 1966).

[24] TEX. REV. CIV. STAT. ANN. art. 852(a), § 11.12(5)(b) (1964) provides in part: "[N]o evidence shall be admissible which was not adduced at the hearing on the matter before the Commission or officially noticed in the record of such hearing."

[25] Under the prior law, former TEX. REV. CIV. STAT. ANN. art. 881a-2 (1951), the Commissioner was to determine if "public convenience and advantage" would be served by a new institution and if "the population in the neighborhood . . . affords a reasonable promise of adequate support. . . ." The present law, TEX. REV. CIV. STAT. ANN. art. 852a, § 2.08 (1964), provides in part that the Commissioner must find "there is a public need for the proposed association and the volume of business in the community in which the proposed association will conduct its business is such as to indicate profitable operation. . . ."

[26] Gibraltar Sav. Ass'n v. Gerst, 417 S.W.2d 584 (Tex. 1967).

technical grounds,[27] expressly refrained from discussing whether the court below should have rendered judgment affirming the Commissioner rather than remanding the cause to that official in the interest of justice.

The *Gibraltar* case illustrates that growing pains are ahead before adjustment can be made to all of the inroads upon judicial review under the "Texas Substantial Evidence Rule" occasioned by the appeal provisions of the revised Savings and Loan Act, as interpreted in *Nixon*.[28] In the present case the court of civil appeals notably gave effect to language in *Nixon* by pointing out that all " 'hearsay' evidence, not subject to some exception, has no probative force even though admitted without exception."[29] The supreme court did not generalize to the same extent. It confined its per curiam opinion to an approval of the holdings that substantial evidence supported the administrative findings of lack of public need for the proposed branch office; and that an *ex parte* affidavit contained in the administrative record may not be considered by the court in determining whether there is substantial evidence supporting the Commissioner's order, even though the affiant testified at the trial in the district court.

The federal courts[30] and probably the majority of the state courts[31] generally would not require that evidence inadmissible in a judicial trial be for all practical purposes excised from an administrative record.[32] If the evidence was admitted by an agency of the executive branch of the federal government, which is not bound by rules of evidence (and what ones are?), and if it appears to be sufficiently trustworthy to be relied on in the ordinary conduct of serious business affairs, it can be considered by the reviewing court in determining the existence of substantial evidence, *provided* there is other competent evidence looking in the same direction. The trend in the federal courts[33] is not to impose the caveat of the proviso. Some state courts,[34] seemingly a small minority, require that the evidence constituting substantial evidence must be competent. It is far from clear that the Texas Supreme Court intends to go this far, but it came close in *Gerst v. Nixon*, in language which the court of civil appeals quoted in the case under discussion.[35] This language may have been occasioned by the fact that the supreme court in *Nixon* was compelled to determine the

[27] The court stated that the rules and decisions cited by the court of civil appeals in support of its remand to the Commissioner did not support its action. The court refrained from resolving the issue on the ground that it was properly before the court.

[28] 411 S.W.2d 350 (Tex. 1966).

[29] 413 S.W.2d 721, 723 (Tex. Civ. App. 1967).

[30] K. DAVIS, ADMINISTRATIVE LAW § 14.11 (1959).

[31] 2 AM. JUR. *Administrative Law* §§ 376-82 (1962); E. STASON & F. COOPER, THE LAW OF ADMINISTRATIVE TRIBUNALS 402-405 (3d ed. 1957).

[32] *Contra*, Southern Stevedoring Co. v. Voris, 190 F.2d 275 (5th Cir. 1951) (*ex parte* letter reports, not under oath, excluded; due process requires right of cross examination).

[33] W. McGrath Corp. v. Hughes, 264 F.2d 314 (5th Cir. 1959); NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938). *But see* NLRB v. Amalgamated Meat Cutters & Butcher Workmen of N. America, 202 F.2d 671 (9th Cir. 1953).

[34] K. DAVIS, ADMINISTRATIVE LAW § 14.12 (1959).

[35] In *Nixon* the supreme court stated, "The circumstance that the record of the Commissioner's hearing contains hearsay or other species of evidence deemed unreliable is a matter for the consideration of the trial judge in determining the issue of 'substantial evidence'." 411 S.W.2d 350, 357 (Tex. 1966).

constitutionality of a statute which it construed as precluding the courts from taking any evidence in reviewing the Savings and Loan Commissioner's orders. The supreme court partially bridged the gap between customary judicial review and this iconoclastic legislative approach by emphasizing the formal hearing procedures the statute enjoined upon the administration. But it also found that the legislature has authority to restrict judicial examination into administrative arbitrariness to the record made before the administrative tribunal. The reviewing court may, however, consider the reliability of the evidence taken at the administrative hearing in determining the issue of "substantial evidence."

Having hurdled the major question in *Nixon*, and having properly found no constitutional infringment of the court's power in the area of regulation under consideration, it would be a mistake by over-superintendence of the administrative tribunal to hold it to hearing rules often not followed by the courts themselves in non-jury trials. This mistake was avoided by the supreme court in its per curiam opinion.

In *Gibraltar* the court of civil appeals might on first reading appear to be clearly over-superintending by its remand to the Commissioner for further administrative development of the public need issue through testimony by a witness such as the affiant, and the court could have obtained the same result by reversing the trial court with directions. In either case, however, the court of civil appeals seems to be asking for no more than an adequate administrative pursuit of the public need issue by requiring the obtaining of evidence which both the administrative tribunal and the reviewing court can duly consider, each acting in its proper sphere.

IV. Rule Making

Statutory Authority. The court of civil appeals decision in *State Board of Examiners in Optometry v. Carp*[36] was discussed in last year's *Survey*[37] while appeal was pending to the supreme court. The plaintiffs, owners of a chain of optical clinics, challenged the power of the Board of Examiners in Optometry to adopt a rule prohibiting the use of an assumed name in the practice of optometry. The trial court upheld the Board's authority to make the rule, a decision which was reversed by the court of civil appeals. The supreme court agreed with the trial court and in reversing the court of civil appeals stated that "The practice of a profession under a trade name has often been regulated and prohibited by rules."[38] However, it would appear that none of the cases[39] cited by the court offers a

[36] 412 S.W.2d 307 (Tex. 1967).

[37] FitzGerald, *Administrative Law, Annual Survey of Texas Law*, 21 Sw. L.J. 199, 216-19 (1967).

[38] 412 S.W.2d 307, 312 (Tex.), *cert. denied*, 88 S. Ct. 241 (1967).

[39] Five of the nine cases cited from other jurisdictions involve rules regulating advertising, not use of trade names: Fisher v. Schumacher, 72 So. 2d 804 (Fla. 1954); State Bd. of Dental Examiners v. Bohl, 162 Kan. 156, 174 P.2d 998 (1946); Strauss v. University of New York, 161 N.Y.S.2d 97, 141 N.E.2d 595 (Ct. App. 1957); Strauss v. University of New York, 282 App. Div. 593, 125 N.Y.S.2d 821 (Sup. Ct. 1953); Strauss v. University of New York, 186 Misc. 242, 59 N.Y.S.2d 429 (Sup. Ct. 1945). The sixth upheld a very general statute prohibiting a corporation from employing a licensed optometrist and obtaining fees for his services, Pearle Optical v.

precise analogy to the present case; indeed the Supreme Court of Texas did not cite the cases as such. The court's reference to extra-state regulation of optometry by administrative rule, however, tends to impart a tone of uniformity of regulation. Moreover, as Justice Smith's dissenting opinion[40] emphasizes, the majority opinion responds somewhat more summarily than analytically to the serious contention that a broad delegation of power was not given by the legislature to the state Board.[41] In other respects the majority opinion gives painstaking analysis to the issues before it. The result here might have been forecast by the decision in *Kee v. Baber*,[42] ten years before, which upheld rules adopted by the Board of Examiners in Optometry regulating "bait advertising," the examination of patients and the practice of optometry on the premises of mercantile establishments.

V. Judicial Review

Method of Review: Statutory Appeals. The rule is well settled in Texas that appeal does not lie from an order of an administrative tribunal unless a statute provides for appeal, or unless the order violates a constitutional right or adversely affects a vested property right. However, as the Texas Supreme Court said in *Stone v. Texas Liquor Control Board*,[43] affirming a court of civil appeals judgment,[44] this rule when coupled with an unusual statutory review provision[45] can lead to "anomalous" results. A citizen who unavailingly protested the grant of a beer license to one Bozarth before the county judge and the Texas Liquor Control Board was held to have no right to appeal to the district court. The only right of appeal from the decision of the Board is given by statute to the applicant who is denied a license. The same statute by implication allows an

State Bd. of Examiners in Optometry, 219 Ga. 364, 133 S.E.2d 374 (1963); another case involved a statute conferring express authority upon a state board to prohibit advertising or the attempt to practice under an assumed name, Silverman v. Board of Registration in Optometry, 344 Mass. 129, 181 N.E.2d 540 (1962); another involved a general statute under which a rule was adopted forbidding the splitting of fees and misleading signs, Toole v. State Bd. of Dentistry, 306 Mich. 527, 11 N.W.2d 229 (1943). The ninth case, which concerned a Mississippi statute delegating authority to a state board of optometry to revoke optometric certificates for unprofessional and unethical conduct and to adopt necessary regulations to carry out the provisions of the statute, held that the Board could prohibit by rule window displays and use of lay persons for professional services, but could not prohibit by rule the fitting of hearing aids since this would be in excess of the granted power, State Bd. of Optometry v. Orkin, 249 Miss. 430, 162 So. 2d 883 (1964).

[40] State Bd. of Examiners in Optometry v. Carp, 412 S.W.2d 307, 314 (Tex.), *cert. denied*, 88 S. Ct. 241 (1967).

[41] Ten statutory grounds are provided for revocation of licenses by the Board. Tex. Rev. Civ. Stat. Ann. art. 4563 (1960). A license may be revoked when the licensee (1) is guilty of gross immorality; (2) is guilty of any fraud in the practice of optometry; (3) is unfit or incompetent by reason of negligence; (4) has been convicted of a felony or a misdemeanor which involves moral turpitude; (5) is an habitual drunkard or addicted to drugs or is insane; (6) has employed, hired, or induced another not licensed to practice in Texas, to so practice; (7) aids or abets in the practice of optometry any person not licensed to practice; (8) employs solicitors for the purpose of obtaining patronage; (9) lends, leases or otherwise places his license at the disposal of any person not licensed to practice; or (10) has wilfully or repeatedly violated any of the first nine provisions.

[42] 157 Tex. 387, 303 S.W.2d 376 (1957).

[43] 417 S.W.2d 385 (Tex. 1967).

[44] Stone v. Texas Liquor Control Bd., 407 S.W.2d 830 (Tex. Civ. App. 1966).

[45] Tex. Pen. Code Ann. art. 667-6 (1952).

appeal to the court of civil appeals by a citizen who protests a judgment of the district court reversing a denial of a license by the Board. Otherwise, the protesting citizen has no appeal since he lacks a constitutional right, a vested right, or a statutory right.[46] No one may appeal the granting of the license.

Article 6701h, section 2(b)[47] in broad outline provides that appeal from drivers' license suspension orders of the Department of Public Safety may be filed in the county where the aggrieved party resides. In *Schwantz v. Department of Public Safety*[48] the court of civil appeals held that such appeals may not be prosecuted in a county other than that provided by statute. The statute was not only a venue statute but also provided for the exclusive jurisdiction of appeals from such license suspension orders. Since the license was only a statutory privilege and not a vested property right, no appeal constitutionally was required to review the suspension. The opinion in *Schwantz*[49] contains helpful references to a number of differing statutory provisions for review of administrative decisions with specific reference to the county in which the appeal shall be instituted.

De Novo Review: Effect of Appeal. In *State Board of Medical Examiners v. Mann*[50] the Supreme Court of Texas affirmed the court of civil appeals and relied upon its reasoning: If a cross-action is filed by an administrative tribunal in a proceeding reviewing de novo a licensing revocation, its dismissal for want of prosecution renders the revocation invalid.[51]

Article 4506,[52] providing for appeal from administrative orders of the Medical Examiners, declares that the appeal should be "by trial de novo as it exists between justice and county courts."[53] However, the statute also expressly provides that the Board's order shall not be suspended during appeal except by stay or injunction upon application to the district court. If de novo review in this instance is given the same effect as review in civil actions between justice and county courts, the result is an automatic cancellation of the Board's order when appeal is filed.[54] But, the statute expressly forbids such a result. In *Mann* the problem was further complicated by the cross-action filed by the Board in the review proceeding. If the rules applicable to appeals between the justice and county courts are applied, the order loses its validity; if the statutory proviso against sus-

[46] The result reached by the court of civil appeals and supreme court in this case had previously been reached in State v. Lemaster, 275 S.W.2d 164 (Tex. Civ. App. 1955) and Texas Liquor Control Bd. v. Abogado, 172 S.W.2d 778 (Tex. Civ. App. 1943).

[47] TEX. REV. CIV. STAT. ANN. art. 6701h, § 2(b) (1967).

[48] 415 S.W.2d 12 (Tex. Civ. App. 1967) *error ref.*

[49] *Id.* at 14-15.

[50] 413 S.W.2d 382 (Tex. 1967) (Mann, the aggrieved doctor, was seeking to compel the Board by mandamus to issue him a license).

[51] In the court of civil appeals opinion it was emphasized that if the dismissal did not annul the Board's order, the doctor would be placed in the position of having to prosecute himself. Mann v. State Bd. of Medical Examiners, 403 S.W.2d 218 (Tex. Civ. App. 1966), *discussed in* Fitz-Gerald, *Administrative Law, Annual Survey of Texas Law*, 21 Sw. L.J. 199, 200 (1967).

[52] TEX. REV. CIV. STAT. ANN. art. 4506 (1966).

[53] *Id.*

[54] Harter v. Curry, 101 Tex. 187, 105 S.W. 988 (1907); Woldert Grocery Co. v. Booneville Elevator Co., 99 Tex. 581, 91 S.W. 1082 (1906).

pension is applied, the order remains in effect. The supreme court stated "[A]s the Court of Civil Appeals put it, a contrary holding would permit the Board to 'win its case by failing to prosecute in the same manner and to the same extent as it could win it by a successful prosecution before Court and Jury.' "[55] In support of its decision the court cited *Bender Bros. v. Lockett*,[56] involving an appeal from a justice court to a county court. In this cited case the court stated that the appeal has the effect *ab initio* of cancelling the judgment, and that the successful plaintiff in the justice court bears the burden of prosecuting the case after appeal.

Mann is distinguishable from *Bender Bros.*, for not only did the former involve an administrative agency, but the statute under construction, while providing for de novo review, also provided that the administrative order would not be suspended during pendency of the appeal except as the court should exercise its equitable powers to stay the effectiveness of the order.[57] The provision "trial de novo, as such term is commonly used and intended in an appeal from the justice court to the county court,"[58] if strictly construed, would necessitate the result of *Bender Bros.*; but this would give no effect to the proviso, the apparent intent of which was to continue the administrative order in effect except as the court might enjoin its enforcement during court review. The court reconciled the two conflicting provisions of the statute by somewhat strained reasoning.[59] Such strict decisions often result in the hamstringing of administrative process.

As was said in last year's *Survey* Article, the decision reached by both the court of civil appeals and the Texas Supreme Court in this case exalts a niche-like application of de novo concepts over analysis of legislative intent. It would seem to follow that the aggrieved party who voluntarily dismisses his de novo appeal puts the immediate burden on the administrative tribunal of proceeding to prove its case and to obtain at least a "default" judgment.

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[55] State Bd. of Medical Examiners v. Mann, 413 S.W.2d 382, 385 (Tex. 1967).

[56] 64 Tex. 556 (1885). The supreme court in *Bender Bros.* stated: "The judgment below being vacated, it is the duty of plaintiff to prosecute his suit to obtain a new judgment, and, if dismissed, he is out of court as effectually as if his suit had never been commenced in the court below."

[57] TEX. REV. CIV. STAT. ANN. art. 4506 (1966). "Any person whose license to practice medicine has been cancelled, revoked or suspended by the Board may . . . take an appeal . . . but the decision of the Board shall not be enjoined or stayed except on application to such district court after notice to the Board."

[58] TEX. REV. CIV. STAT. ANN. art. 4506 (1966).

[59] The cross-action loses its significance because the court stresses that the Board must prosecute the action in the district court as plaintiff. This is only an extension of the rule announced in Scott v. State Bd. of Medical Examiners, 384 S.W.2d 686 (Tex. 1964) where the court held that when the doctor appeals from an order of the Board, the burden of proof is on the Board.