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A REAPPRAISAL OF THE SUBSTANTIAL EVIDENCE RULE IN TEXAS ADMINISTRATIVE LAW

*Whitney R. Harris**

THE judicial review of administrative action in Texas has been the subject of frequent¹ and sometimes critical² comment. It has been suggested that in the oil and gas field, at least, too much emphasis has been given to this aspect of the administrative process while too little attention has been paid to agency practice and procedure.³ However that may be, if personal and property rights are to remain secure in the face of rapidly expanding governmental controls exercised through administrative bodies,⁴ realistic resort to the courts must be available to test the legality of administrative regulations and to protect private parties from arbitrary administrative action. The scope and effectiveness of such review ultimately may determine the extent to which free economic enterprise is to be retained in America.⁵

Administrative restraints upon business are usually thought of as being upon a national level. Without for a moment discounting the tremendous control asserted by the federal government over industry under recently broadened judicial definitions of interstate commerce,⁶ it should not be overlooked that state governments

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¹ LIPSCOMB, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION IN TEXAS (1938); *Scope of Judicial Review of Railroad Commission Orders*, 2 SOUTHWESTERN L. J., 278 (1948); *Judicial Review of Administrative Action*, 2 SOUTHWESTERN L. J. 334 (1948).

² Hyder, *Exceptions to the Spacing Rule in Texas*, 27 TEX. L. REV. 481 (1949).

³ Davis and Willbern, *Administrative Control of Oil Production in Texas*, 22 TEX. L. REV. 149, 150 (1944).

⁴ Report of the Attorney General's Committee on Administrative Procedure, Senate Document No. 8, 77th Congress, 1st Session (1941).

⁵ Smith, *Administrative Law: A Threat to Constitutional Government?* 31 VA. L. REV. 1 (1944).

⁶ Wickard v. Filburn, 317 U. S. 111 (1942); *United States v. Darby*, 312 U. S. 100 (1940).

likewise are making constantly increasing use of the administrative process in the regulation of important segments of the economy. Among the business activities subject to administrative supervision in Texas are railroads,⁷ motor carriers,⁸ public utility gas companies,⁹ the oil and gas industry,¹⁰ appropriation of water,¹¹ insurance,¹² banking,¹³ agriculture,¹⁴ aeronautics,¹⁵ and securities,¹⁶ not to mention many licensing boards which control various trades and professions.¹⁷ A proper regard for the extensive interests thus subjected to administrative regulation demands adequate judicial remedies against the possibility of arbitrary or unreasonable administrative action.

In Texas there usually is no difficulty in obtaining judicial review of administrative action which affects private rights. Review is commonly provided for by statutes which may call for a trial *de novo*,¹⁸ for a suit or trial as in other civil causes,¹⁹ or simply

⁷ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6444, *et seq.*

⁸ TEX. REV. CIV. STAT. (Vernon, 1948) arts. 911a and 911b.

⁹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6050, *et seq.*

¹⁰ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6004, *et seq.*

¹¹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 7467, *et seq.*

¹² TEX. REV. CIV. STAT. (Vernon, 1948) art. 4679a, *et seq.*

¹³ TEX. REV. CIV. STAT. (Vernon, 1948) art. 342-103, *et seq.*

¹⁴ TEX. REV. CIV. STAT. (Vernon, 1948) art. 47, *et seq.*, art. 1287-1, art. 5562, *et seq.*

¹⁵ TEX. REV. CIV. STAT. (Vernon, 1948) art. 46c-1, *et seq.*

¹⁶ TEX. REV. CIV. STAT. (Vernon, 1948) art. 600a.

¹⁷ Including: architects, attorneys, barbers, chiroprodists, dentists, embalmers, employment and labor agents, engineers, hairdressers and cosmetologists, insurance agents, land surveyors, librarians, liquor dealers, nurses, optometrists, pharmacists, physicians, plumbers, real estate dealers, securities salesmen, teachers, transportation brokers, and veterinarians.

¹⁸ Workmen's Compensation Act, TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 5, (and see TEX. REV. CIV. STAT. (Vernon, 1948) art. 6674s, § 11); Liquor Control Act, TEX. PEN. CODE (Vernon, 1948) arts. 666-5, 666-14, 667-6; Motor Vehicle Operators Act, TEX. REV. CIV. STAT. (Vernon, 1948) arts. 6687b, § 31; State Board of Hairdressers and Cosmetologists, TEX. PEN. CODE (Vernon, 1948) art. 734b, § 16; State Bank Board, TEX. REV. CIV. STAT. (Vernon, 1948) art. 342-115; Awards of County Commissioner's Courts, TEX. REV. CIV. STAT. (Vernon, 1948) art. 2372g-1.

¹⁹ Motorbus Act, TEX. REV. CIV. STAT. (Vernon, 1948) art. 911a; Motor Carriers Act, TEX. REV. CIV. STAT. (Vernon, 1948) art. 911b; Oil and Gas Conservation, TEX. REV. CIV. STAT. (Vernon, 1948) art. 6049c-8, art. 6008, § 24, art. 6008a, § 6; Railroads, TEX. REV. CIV. STAT. (Vernon, 1948) arts. 6452, 6453, 6454; Gas Utility Rates, TEX. REV. CIV. STAT. (Vernon, 1948) art. 6059; State Banking Commissioner, TEX. REV. CIV. STAT. (Vernon, 1948) art. 342-805; Petroleum Storage Facilities, TEX. REV. CIV. STAT.

for an appeal.²⁰ And in the absence of statutory review, the courts have generally found methods by which parties aggrieved may gain their day in court.²¹ Of principal concern to private litigants is the scope of review allowed when a case involving an alleged abuse of administrative authority is properly before the court. Of course, a judicial remedy is always available to correct or avoid administrative action which is contrary to a provision of the constitution,²² involves an error of law,²³ or is in excess of jurisdiction.²⁴

(Vernon, 1948) art. 6049a, § 12; State Board of Dental Examiners, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4549 (cf. TEX. PEN. CODE (Vernon, 1948) art. 752c, § 5); State Board of Chiropody Examiners, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4573; Boards of Adjustment (Zoning), TEX. REV. CIV. STAT. (Vernon, 1948) art. 1011g (cf. TEX. REV. CIV. STAT. (Vernon, 1948) art. 46e-11); Board of Barber Examiners, TEX. PEN. CODE (Vernon, 1948) art. 734a, § 22a; Board of Insurance Commissioners, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4893.

²⁰ The Securities Act, TEX. REV. CIV. STAT. (Vernon, 1948) art. 600a, § 28; Board of Insurance Commissioners, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4698a, § 11 and art. 4682b, § 10; State Board of Pharmacy, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4542a, § 12; Texas State Board of Examiners in Optometry, TEX. REV. CIV. STAT. (Vernon, 1948) art. 4563.

²¹ In a proper case the validity of a statute establishing an administrative procedure may be called in question by a suit for declaratory relief. *City of Fort Worth v. Fire Department*, 213 S. W. (2d) 347 (Tex. Civ. App. 1948), *reversed in part on other grounds*, *Fire Department of the city of Fort Worth v. City of Fort Worth*, 147 Tex. 505, 217 S. W. (2d) 664 (1949). Under some circumstances, a writ of mandamus may be obtained to compel an administrative agency to take action required of it as a matter of law. *Louder v. Texas Liquor Control Board*, 214 S. W. (2d) 336 (Tex. Civ. App. 1948) *writ of error refused*; *State Board of Registration for Professional Engineers v. Hatter*, 139 S. W. (2d) 169 (Tex. Civ. App. 1940). Suits for injunctive relief are commonly filed to restrain administrative agencies where the action taken, or threatened, is alleged to be *ultra vires*, or the statute, act or ordinance pursuant to which the action is taken, is alleged to be void. *Forwood v. City of Taylor*, 147 Tex. 161, 214 S. W. (2d) 282 (1948); *Board of Insurance Commissioners v. Texas Emp. Ins. Assn.*, 144 Tex. 543, 192 S. W. (2d) 149 (1946); *Canales v. Laughlin*, 147 Tex. 169, 214 S. W. (2d) 451 (1948); *Missouri, K. & T. Ry. Co. v. Shannon*, 100 Tex. 379, 100 S. W. 138 (1907); *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S. W. 301 (1921); *Leach v. Coleman*, 188 S. W. (2d) 220 (Tex. Civ. App. 1945) *writ of error refused, want of merit*; *Bexar County v. Humble Oil & Refining Co.*, 213 S. W. (2d) 882 (Tex. Civ. App. 1948) *writ of error refused, no reversible error*.

²² *Gulf, C. & S. F. Ry. Co. v. State*, 120 S. W. 1028 (Tex. Civ. App. 1909) *writ of error refused*; *Texas Consol. Theatres v. Pittilo*, 204 S. W. (2d) 396 (Tex. Civ. App. 1947).

²³ As in the case of the "more wells, more oil" theory of exceptions to the oil well spacing rule of the Railroad Commission. *Hawkins v. Texas Company*, 146 Tex. 511, 518, 209 S. W. (2d) 338, 343 (1948), and cases there cited.

²⁴ *Board of Insurance Commissioners v. Texas Emp. Ins. Assn.*, 144 Tex. 543, 192 S. W. (2d) 149 (1946); *Canales v. Laughlin*, 147 Tex. 169, 214 S. W. (2d) 451 (1948); *Humble Oil & Refining Co. v. Railroad Commission*, 133 Tex. 330, 128 S. W. (2d) 9 (1939); *Davis v. San Antonio & G. S. Ry. Co.*, 92 Tex. 642, 51 S. W. 324 (1899).

But the justness or reasonableness—the fairness—of administrative action most frequently turns upon an evaluation of fact issues. And the extent to which judicial review is of practical protection to persons subject to administrative control thus depends in great part upon the scope of review which the courts allow upon questions of fact. In Texas, judicial review of administrative determinations of fact is commonly said to be by the “substantial evidence rule.”

THE SUBSTANTIAL EVIDENCE RULE IN FEDERAL ADMINISTRATIVE LAW

Before considering the substantial evidence rule in Texas administrative law, it may be helpful to point out briefly the meaning and extent of that doctrine in federal administrative law, since the phrase “substantial evidence,” insofar as it has become the catchword of judicial review of administrative action, owes its prominence to federal legal usage.²⁵

A large number of federal administrative statutes use the words “substantial evidence” or the equivalent thereof in prescribing limitations upon judicial review of administrative fact findings.²⁶ Even where the act provides that the findings of fact of the agency shall be final or conclusive the courts have read into the law a qualification that such findings must be supported by *substantial* evidence. For example, the National Labor Relations Act provides that the findings of the Board as to the facts, if supported by evidence, shall be conclusive.²⁷ In *Consolidated Edison Co. v. National Labor Relations Board*,²⁸ Mr. Chief Justice Hughes, speaking for the Supreme Court, said of this act:

²⁵ Stason, “Substantial Evidence” in *Administrative Law*, 89 U. OF PA. L. REV. 1026 (1941).

²⁶ “Not only the Labor Relations Act but also some eighteen other federal statutes have set up the substantial evidence standard for judicial review of fact decisions of the administrative agencies in charge.” STASON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE TRIBUNALS*, note, page 610 (2nd ed. 1947).

²⁷ 29 U. S. C. A. § 160(e).

²⁸ 305 U. S. 197, 229 (1938).

"We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by substantial evidence. *Washington, V. & M. Coach Co. v. National Labor Relations Board*, 301 U.S. 142, 147. Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

A somewhat different quality of review has been prescribed by the Supreme Court for rate cases in which the utility contends that the rates fixed by the administrative body are so low as to be confiscatory of its property. In such cases the court has held that there must be an independent judicial review of the facts and the law by courts of competent jurisdiction to the end that the constitution may be maintained as the supreme law of the land.²⁹ In rate cases there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing,³⁰ the complaining party carries the burden of making a convincing showing, and the court will not interfere unless confiscation is clearly established;³¹ but the courts cannot be required by statute to accept findings of the commission as final even when supported by substantial evidence.³²

Judicial review of administrative determinations of fact in the federal courts normally is based upon the record adduced before

²⁹ *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936).

³⁰ *Darnell v. Edwards*, 244 U. S. 564 (1917).

³¹ *Los Angeles Gas & Electric Co. v. Railroad Commission*, 289 U. S. 287 (1933); *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151 (1934); *Dayton Power & Light Co. v. Public Utilities Commission*, 292 U. S. 290 (1934).

³² *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38 (1936). The court has refused to permit federal courts to exercise independent judicial review in oil and gas cases in which it is alleged that the order of a state administrative agency is confiscatory of property rights in oil, where the controlling statute affords the possibility of adequate review in the state courts. *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 310 U. S. 573 (1940); *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*, 311 U. S. 570 (1941); but *cf.* *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1936). And see *Summers, Does the Regulation of Oil Production Require the Denial of Due Process and the Equal Protection of the Laws?* 19 TEX. L. REV. 1 (1940), *Davis, Judicial Emasculation of Administrative Action and Oil Proration; Another View*, 19 TEX. L. REV. 29 (1940), and *Hardwicke, Oil Conservation: Statutes, Administration and Court Review*, 13 MISS. L. J. 381 (1941).

the administrative body. If no constitutional rights are involved, the findings of the agency may be made conclusive upon the courts, in which case judicial inquiry goes no further than to ascertain whether there is substantial evidence in the record to support the findings. A finding of fact which is not based upon substantial evidence is arbitrary, and a person whose rights are adversely affected by an order founded upon such a finding is deprived of his rights without due process of law in the procedural sense.

Where constitutional rights of liberty or property are involved, however, regard to the supremacy of the constitution necessitates the exercise of independent judicial judgment upon the facts. Not only are the parties entitled to a fair hearing before the agency, with findings based upon substantial evidence, but they are likewise entitled to a judicial determination of whether they have been deprived of rights without due process of law considered in the substantive sense. This does not "require or justify" disregard of the considered conclusions of the commission based upon evidence after a full administrative hearing. There is a strong presumption in favor of the conclusions of the agency and the court is not, even where constitutional rights are in issue, merely to substitute its judgment for that of the commission. The complaining party carries the burden of making a convincing showing and the court will not interfere with the action complained of unless the invasion of a constitutional right is clearly established.

THE SUBSTANTIAL EVIDENCE RULE IN TEXAS ADMINISTRATIVE LAW

The substantial evidence rule in Texas administrative law, stated broadly, means that in all cases of direct attack upon administrative orders, whether pursuant to statutory appeal or by special writ or remedy in the absence of statutory appeal, the trial court is limited to the determination of whether, from all the evidence adduced in the trial of the cause before the court, the action of the agency is illegal, arbitrary, or capricious, or is not reasonably supported by

substantial evidence.³³ If reasonable minds could not have reached the conclusion that the agency must have reached in order to justify its action the order must be set aside.³⁴ A full retrial of fact issues is required in the trial court, and it is to the record adduced before the court rather than to the record adduced before the agency, that the substantial evidence principle is applied.³⁵

The substantial evidence rule is of comparatively recent origin in Texas. In the early cases involving judicial review of administrative action the courts complied strictly with the statutory provisions for review.³⁶ Fact issues passed upon by the agency were subject to judicial inquiry, but the courts gave *prima facie* validity to commission findings, placed the burden upon the party complaining to show the unreasonableness or unjustness of the order, and refused to substitute judicial judgment for agency discretion.³⁷ In cases involving railroad rates fixed by the Railroad Com-

³³ Texas Liquor Control Board v. Floyd, 117 S. W. (2d) 530 (Tex. Civ. App. 1938); Railroad Commission v. Metro Bus Lines, 144 Tex. 420, 191 S. W. (2d) 10 (1945); Hawkins v. Texas Company, 146 Tex. 511, 209 S. W. (2d) 338 (1948); Blair v. Board of Trustees, 161 S. W. (2d) 1030 (Tex. Civ. App. 1942).

³⁴ Railroad Commission v. Shell Oil Co., 139 Tex. 66, 161 S. W. (2d) 1022 (1942); Trapp v. Shell Oil Co., 145 Tex. 323, 198 S. W. (2d) 424 (1946).

³⁵ Miller v. Tarry, 191 S. W. (2d) 501 (Tex. Civ. App. 1945) *writ of error refused, no reversible error*; Hawkins v. Texas Company, 146 Tex. 511, 209 S. W. (2d) 338 (1948).

³⁶ Railroad Commission v. Galveston Chamber of Commerce, 105 Tex. 101, 145 S. W. 573 (1912); St. Louis Southwestern Ry. Co. v. State, 255 S. W. 390 (Tex. Com. App. 1923); San Antonio & A. P. Ry. Co. v. Railroad Commission, 275 S. W. 261 (Tex. Civ. App. 1925); Railroad Commission v. Houston Chamber of Commerce, 124 Tex. 375, 78 S. W. (2d) 591 (1935).

³⁷ Thus in State v. St. Louis Southwestern Ry. Co. of Texas, 165 S. W. 491 (Tex. Civ. App. 1913), *writ of error dismissed*, the court said: "The findings of fact found by the trial court as to reasonableness and public necessity were the reverse of those found by us. Ordinarily we would feel bound by the findings of fact by the trial court, unless it clearly appeared that such findings were wrong. In this case, however, we regard the Railroad Commission as occupying the place ordinarily occupied by a trial court. The duty devolved upon it primarily to ascertain the facts. The suit before the district court upon appellees' answer was in the nature of an appeal from the findings of the commission. The statute provides that in such suits the burden rests upon the party complaining of the orders of the commission to show, 'by clear and satisfactory evidence,' that the orders complained of are unjust and unreasonable. Article 6658, R. S. 1911; Commission v. Chamber of Commerce, 105 Tex. 101, 145 S. W. 580; Ry. Co. v. Commission, 102 Tex. 353, 113 S. W. 741, 116 S. W. 795. The findings of fact by the commission upon which its orders are based are to be taken as *prima facie* correct. Revisory power is lodged in the court, but 'it was not intended that we (nor the trial court) should substi-

mission the burden was placed by statute upon the party complaining of the rate to prove that it was unjust or unreasonable as to him.³⁸ Where the party complaining sustained this burden the order was set aside;³⁹ where he failed, the order was affirmed.⁴⁰ The courts seem to have encountered no real difficulty in following the statutory scheme of review in these early cases, and in none of them was reference made to the doctrine of "substantial evidence."

The substantial evidence rule initially arose out of cases involving orders of the Railroad Commission upon applications for certificates of public convenience and necessity for motor transportation services over state highways. The leading case under the motor bus laws is *Shupe v. Railroad Commission*,⁴¹ decided in

tute our judgment for that of the commission every time there is a dispute touching the particular place on the line of a railroad where it would be best for the public interest that a station or a depot should be placed.' Ry. Co. v. Ry. Com., 109 La. 247, 33 South. 214. In this case the evidence is conflicting; hence our findings of fact are made in conformity with the facts found by the Railroad Commission." On rehearing, the court clarified its remarks as follows: "We did not mean to say that we were called upon to review the evidence adduced before the commission. We have no knowledge as to what such evidence was. The only testimony in the record is that given in the district court upon the trial of this case, and upon such trial it would not have been permissible to prove what was testified to before the Railroad Commission, except by way of impeaching a witness. What we meant by the language above quoted is that, inasmuch as the statute makes the orders of the commission binding, unless the party complaining of the same shall prove by clear and satisfactory evidence that they are unreasonable and unjust to him, an appellate court must indulge in favor of such orders all the presumptions that are given by law to the judgment of a trial court. That is to say, it must be presumed that an order so made was justified by the facts in the case, until the contrary is clearly and satisfactorily shown by the testimony adduced in the district court in a suit to set aside such order."

³⁸ "In all trials under the foregoing article the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them." TEX. REV. CIV. STAT., art. 4566 (1911).

³⁹ *Railroad Commission v. Galveston Chamber of Commerce*, 115 S. W. 94 (Tex. Civ. App. 1908) writ of error refused; *Railroad Commission v. Houston Chamber of Commerce*, 124 Tex. 375, 78 S. W. (2d) 591 (1935).

⁴⁰ *Railroad Commission v. Galveston Chamber of Commerce*, 105 Tex. 101, 145 S. W. 573 (1912). The same approach was taken by the courts in cases involving commission orders for the erection of depots. *St. Louis Southwestern Ry. Co. v. State*, 255 S. W. 390 (Tex. Com. App. 1923); *San Antonio & A. P. Ry. Co. v. Railroad Commission*, 275 S. W. 261 (Tex. Civ. App. 1925).

⁴¹ 123 Tex. 521, 73 S. W. (2d) 505 (1934); and note companion cases, *Texas Motor Coaches v. Railroad Commission*, 123 Tex. 517, 73 S. W. (2d) 511 (1934) and *Texas and*

1934, in which the court held that if the findings and orders of the commission had any reasonable basis in fact, and were not shown to be arbitrary and unreasonable, they must be supported by the court. No direct reference was made to "substantial evidence" in the opinion of the Supreme Court in that case, or in the opinion of the Court of Civil Appeals, written by Justice Blair, which it approved.⁴² In a companion case under the motor carrier laws, however, Justice Blair declared:⁴³

"And as held in the *Shupee* Case, the appeal sections of the act are similar and are interpreted to mean that the court on appeal shall not interfere with the Railroad Commission or review its acts or orders administering the Motor Transportation Acts further than is necessary to keep it within the law, and to require that its orders shall be based upon *substantial evidence*, and not upon an arbitrary exercise of its discretionary power and authority." (Emphasis supplied).

This first reference to "substantial evidence" by Justice Blair constituted a restatement of the rule of the *Shupee* case and was made in response to an argument that under the statute the court was "to put itself in the place of the commission to try the administrative matter of granting the increase schedules anew as an administrative body, substituting its findings with regard to a public convenience and necessity for the service, based upon a preponderance of evidence adduced on the appeal and trial de novo, for those of the commission."⁴⁴ Justice Blair stated quite consistently with previous decisions of the Supreme Court that "such is not the principle on which the court acts on the statutory appeals." Special significance to "substantial evidence" appears not to be warranted from the use of the words in this case.⁴⁵ In

Pacific Motor Transport Co. v. Railroad Commission, 124 Tex. 126, 73 S. W. (2d) 509 (1934).

⁴² *Railroad Commission v. Shupee*, 57 S. W. (2d) 295 (Tex. Civ. App. 1933).

⁴³ *Railroad Commission v. Winkle*, 57 S. W. (2d) 285, 287 (Tex. Civ. App. 1933).

⁴⁴ *Id.*, at 287.

⁴⁵ Shortly after the *Shupee* decision the Supreme Court invalidated an order of the Railroad Commission which had prescribed group rates on sugar and molasses shipments originating in certain cities in the Houston area of the state. The appeal had been

motor carrier cases arising after the *Shupee* decision, however, the statement that the order should be sustained if supported by substantial evidence was used with increasing frequency,⁴⁶ although it was acknowledged that the rule "might appear to do violence to the language" of the statute.⁴⁷

The substantial evidence rule seems first to have appeared in the oil and gas cases, as in the motor carrier cases, through an opinion of the Court of Civil Appeals. In *Brown v. Humble Oil Company*,⁴⁸ decided in 1935, the Supreme Court declared that the test to be applied on review of orders of the Railroad Commission under its spacing rule⁴⁹ was whether the action of the commission was illegal, unreasonable, or arbitrary. On the second appeal in that case, the Court of Civil Appeals said that⁵⁰

"the trial in the district court must be confined to the question as to whether or not the commission acted unreasonably, arbitrarily, or unjustly. The court is not a regulatory body, and cannot act as such. It merely reviews the action of the commission, and, if upon the trial in the district court it appears that the commission's action is sustained by *substantial probative evidence*, then the action of the commission should not be overturned." (Emphasis supplied).

taken to the trial court under a statute which provided that the case should be tried and determined as other civil causes with the burden of proof upon the plaintiff to show that the order complained of was unreasonable and unjust as to it. By applying the statutory presumption of validity and the statutory burden of proof, the court had no difficulty in protecting the rights of the parties aggrieved by the administrative order, without resort to the substantial evidence rule. *Railroad Commission v. Houston Chamber of Commerce*, 124 Tex. 375, 78 S. W. (2d) 591 (1935).

⁴⁶ *Army Post Bus Lines v. Railroad Commission*, 158 S. W. (2d) 872 (Tex. Civ. App. 1942) *writ of error refused*; *North East Texas Motor Lines v. Texas-Pacific Motor Transport Co.*, 159 S. W. (2d) 926 (Tex. Civ. App. 1941); *English v. Railroad Commission*, 219 S. W. (2d) 481 (Tex. Civ. App. 1949).

⁴⁷ *Railroad Commission v. Metro Bus Lines*, 144 Tex. 420, 191 S. W. (2d) 10 (1946). The statute provides expressly that the party complaining of the order shall prove that it is unreasonable and unjust by the preponderance of the evidence. TEX. REV. CIV. STAT. (Vernon, 1948) art. 911a, § 16, and art. 911b, § 20.

⁴⁸ 126 Tex. 296, 83 S. W. (2d) 935 (1935).

⁴⁹ The Railroad Commission has statutory authority to make rules for the conservation of oil and gas resources. TEX. REV. CIV. STAT. (Vernon, 1948) art. 6029. The commission's Rule 37, issued after hearings, establishes a spacing rule for the drilling of wells, and reserves to the commission the power to grant exceptions to prevent waste or the confiscation of property (formerly, to protect vested rights).

⁵⁰ *Humble Oil & Refining Co. v. Railroad Commission*, 112 S. W. (2d) 222, 225 (Tex. Civ. App. 1937) *writ of error dismissed*.

By 1939 the Supreme Court was using similar phraseology. In *Gulf Land Co. v. Atlantic Refining Co.*, decided in that year, the court said:⁵¹

"The court, on appeal from the Commission's order, should not set aside an order of the Commission either granting or refusing to grant a well permit unless such order is illegal, unreasonable, or arbitrary. In so far as the fact findings upon which the order is based are concerned, the order is not illegal, unreasonable, or arbitrary if it is reasonably supported by substantial evidence. Stated in another way, the court does not act as an administrative body to determine whether or not it would have reached the same fact conclusion that the Commission reached, but will consider only whether the action of the Commission in its determination of the facts is reasonably supported by substantial evidence."

It is unnecessary, for the purposes of this paper, to trace the history of the rule through the vagaries of the oil litigation,—the *Trem Carr*,⁵² *Marrs*,⁵³ and *Trapp*⁵⁴ cases, and their progeny,⁵⁵ or to recount here the oft-told story of the unsuccessful struggle waged by former Chief Justice Alexander to obtain for Texas a more generous scope of review than the other members of the Supreme Court were willing to accord parties complaining of administrative action. Nor is it profitable now to speculate to what extent the imposing task of full relitigation of administrative matters in the courts, with consequent drain upon the time and energy of judges already burdened with heavy calendars, may have induced the other members of the court to part with Chief Justice Alexander on this issue so important to the development of Texas administrative law. Suffice it to say that the rule of the *Gulf Land Co.* case, as restated and re-emphasized by the court in *Hawkins v.*

⁵¹ 134 Tex. 59, 74, 131 S. W. (2d) 73, 82 (1939).

⁵² *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022 (1942).

⁵³ *Marrs v. Railroad Commission*, 142 Tex. 293, 177 S. W. (2d) 941 (1944).

⁵⁴ *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S. W. (2d) 424 (1946).

⁵⁵ *Thomas v. Stanolind Oil & Gas Co.*, 145 Tex. 270, 198 S. W. (2d) 420 (1946); *Potter v. Sun Oil Co.*, 144 Tex. 151, 189 S. W. (2d) 482 (1945); *Cook Drilling Co. v. Gulf Oil Corporation*, 139 Tex. 80, 161 S. W. (2d) 1035 (1942); *Railroad Commission - Wencker*, 140 Tex. 527, 168 S. W. (2d) 625 (1943).

Texas Company, decided in 1948, is law today. In the case last cited the court again declared that⁵⁶

“the finding of the Commission will be sustained by the court if it is *reasonably* supported by substantial evidence, meaning evidence introduced in court. The word ‘reasonably’ has been deliberately used in the statement and its use gives to the judicial review a broader scope than it would have if *some* substantial evidence were regarded sufficient of itself to sustain the Commission’s order. It is for the court to determine as a matter of law the reasonableness of the support afforded by substantial evidence. . . . In making its decision of this question the court examines and takes into consideration all of the evidence, the entire record.”

Cases arising under the Texas Liquor Control Act⁵⁷ are in a category somewhat different from the motor carrier cases and are clearly distinguishable from the oil and gas cases. The Supreme Court has pointed out that a license to sell intoxicants is not a property right, but a privilege granted by the state,⁵⁸ and it has been said that

“the only jurisdiction which a court has over the power of the administrative board to cancel a liquor permit or license is to determine whether the board acted within the scope of its delegated authority, based its order or conclusion upon substantial evidence, and did not act arbitrarily or capriciously in making its order.”⁵⁹

With one recent exception,⁶⁰ courts which have considered appeals under this statute have applied the substantial evidence rule.⁶¹ And it has been suggested that if the statute required the

⁵⁶ 146 Tex. 511, 513, 209 S. W. (2d) 338, 340 (1948).

⁵⁷ TEX. PEN. CODE (Vernon, 1948) arts. 666-14 and 667-6. The act provides for trial *de novo* “under the same rules as ordinary suits.”

⁵⁸ *State v. DeSilva*, 105 Tex. 95, 145 S. W. 330 (1912).

⁵⁹ *Bradley v. Texas Liquor Control Board*, 108 S. W. (2d) 300, 303 (Tex. Civ. App. 1937).

⁶⁰ *Texas Liquor Control Board v. Saiz*, 220 S. W. (2d) 502 (Tex. Civ. App. 1949).

⁶¹ *Bradley v. Texas Liquor Control Board*, 108 S. W. (2d) 300 (Tex. Civ. App. 1937); *Texas Liquor Control Board v. Jones*, 112 S. W. (2d) 227 (Tex. Civ. App. 1937); *Texas Liquor Control Board v. Floyd*, 117 S. W. (2d) 530 (Tex. Civ. App. 1938); *State v. Peeler*, 200 S. W. (2d) 874 (Tex. Civ. App. 1947); *Louder v. Texas Liquor Control Board*, 214 S. W. (2d) 336 (Tex. Civ. App. 1948); *Ramos v. Austin*, 220 S. W. (2d) 528 (Tex. Civ. App. 1949).

courts to grant a trial *de novo* wholly without regard to the action of the board, as in workmen's compensation cases, "it would be unconstitutional as an attempt on the part of the Legislature to confer administrative power and duties upon the judicial department of the government."⁶²

It is beyond the scope of this paper to discuss, however briefly, the application of the substantial evidence rule in other fields,⁶³ but certain exceptions to the rule should be noted. The first of these is the review of decisions of the Industrial Accident Board.⁶⁴ The courts have construed the Workmen's Compensation Act to mean that the proceeding in court to review decisions of the Industrial Accident Board shall be *de novo*, "wholly without reference to what may have been decided by the board," with requirement upon the claimant to sustain the burden of proving his claim by the preponderance of the evidence adduced in court.⁶⁵ A second exception is the review of decisions of the Board of Insurance Commissioners relating to casualty insurance,⁶⁶ and orders of the Secretary of State under the Securities Act,⁶⁷ in which by statute the courts are limited to the evidence adduced before the agencies (and, in the case of the Secretary of State, such additional evidence as the court in its discretion may receive) rather than to the evidence adduced before the court. Another exception is the review

⁶² *Bradley v. Texas Liquor Control Board*, 103 S. W. (2d) 300, 302 (Tex. Civ. App. 1937).

⁶³ The rule has been applied in other cases involving both statutory and non-statutory judicial review. *E.g.*, *Consolidated Chemical Industries v. Railroad Commission*, 201 S. W. (2d) 124 (Tex. Civ. App. 1947) *writ of error refused, no reversible error* (review of order of Railroad Commission fixing a special railroad rate, confiscation not involved); *City of San Angelo v. Boehme Bakery*, 144 Tex. 281, 190 S. W. (2d) 67 (1945) (review of order of board of adjustment denying permit under zoning law); *Blair v. Board of Trustees*, 161 S. W. (2d) 1030 (Tex. Civ. App. 1942) (review of order of Board of Education discharging district superintendent of schools); *Texas & New Orleans R. Co. v. Railroad Commission*, 220 S. W. (2d) 273 (Tex. Civ. App. 1949) (review of order of Railroad Commission denying railroad's application to discontinue service).

⁶⁴ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 5; *cf.* TEX. REV. CIV. STAT. (Vernon, 1948) art. 6674s, § 11.

⁶⁵ *Booth v. Texas Employers' Ins. Assn.*, 132 Tex. 237, 123 S. W. (2d) 322 (1938).

⁶⁶ TEX. REV. CIV. STAT. (Vernon, 1948), art. 4698a, § 11.

⁶⁷ TEX. REV. CIV. STAT. (Vernon, 1948) art. 600a, § 28.

of commission rate orders where the utility alleges that the rate is unreasonable and unjust, or confiscatory, as to it. The Supreme Court has held that in such cases the utility is entitled to an independent determination of both law and fact.⁶⁸ A final exception is the express prohibition against use of the substantial evidence rule on appeals from the recently created Texas Real Estate Commission.⁶⁹

REAPPRAISAL OF THE SUBSTANTIAL EVIDENCE RULE

In the April, 1949, issue of the Texas Law Review, Mr. Elton M. Hyder, Jr. writes:

"Our highest court, in the *Trapp* case departed from the rule of *de novo* trial and returned to trial under the substantial evidence rule. We are now approaching the nadir of a recurrent change of policy. We are returning to the shores of the *de novo* trial. Those shores are no longer, 'dimly seen.'"⁷⁰

The shoreline, in his view, is the recent decision of the Supreme Court in *Hawkins v. Texas Company*.⁷¹ Mr. Hyder would construe the substantial evidence rule (in Rule 37 cases) to mean that

⁶⁸ This exception arose out of prolonged litigation over gas utility rates fixed by the Railroad Commission for the Lone Star Gas Company. *State v. Lone Star Gas Co.*, 86 S. W. (2d) 484 (Tex. Civ. App. 1935) *writ of error refused*; *Lone Star Gas Co. v. Texas*, 304 U. S. 224 (1938); *State v. Lone Star Gas Co.*, 129 S. W. (2d) 1164 (Tex. Civ. App. 1939); *Lone Star Gas Co. v. State*, 137 Tex. 279, 153 S. W. (2d) 681 (1941).

⁶⁹ "The substantial evidence rule shall not be used, and the right of trial by jury shall be had in all cases when called for." S. B. No. 28, ch. 149, 51st Legislature, Regular Session, Laws 1949.

⁷⁰ Hyder, *Some Difficulties in the Application of the Exceptions to the Spacing Rule in Texas*, 27 TEX. L. REV. 481, 482 (1949).

⁷¹ 146 Tex. 511, 209 S. W. (2d) 338 (1948). Mr. Hyder states: "Although the *Trapp* and *Thomas* decisions overruled the conflicting statements in the *Trem Carr* and *Marrs* cases, and affirmed the rules announced in the *Gulf Land Company* case, the Supreme Court has now abrogated such decisions and expressly returned to 'a reiteration of the explanation of the substantial evidence rule made in Railroad Commission v. Shell Oil Company, the Trem Carr case.'" Hyder, *Some Difficulties in the Application of the Exceptions to the Spacing Rule in Texas*, 27 TEX. L. REV. 481, 493 (1949). But Mr. Hyder seems to have overlooked that the "reiteration of the explanation of the substantial evidence rule" made in the *Trem Carr* case was quoted with approval in the opinion of the Court on rehearing in the *Trapp* case. *Trapp v. Shell Oil Co.*, 145 Tex. 323, 349, 198 S. W. (2d) 424, 441 (1946).

"as soon as a single witness testifies as to facts which sustain the permit, and such testimony is without impeachment or perjury, and is credible and reasonable of belief, after cross-examination, regardless of a preponderance of the evidence to the contrary, the court is to sustain the permit."⁷²

This "single-witness" theory, so often advanced by agency advocates, has been rejected consistently by the courts.⁷³ The "single witness" theory would place an impossible burden upon persons seeking relief from arbitrary administrative action. Where the order in question involves technical considerations it is hard to imagine any case in which it could not be supported by an expert opinion which, standing alone, appeared "credible and reasonable of belief." Only if the court is permitted to hear all relevant evidence bearing upon the issue is there a fair opportunity to show that the testimony of the expert, though he remain unimpeached, is not credible or reasonable of belief.⁷⁴ And whether the order is reasonably supported by substantial evidence can scarcely be determined save upon an examination of the full record. The Supreme Court has quite properly rejected the "single-witness" theory of substantial evidence.

The basic difficulty with the substantial evidence rule in Texas is not that it requires an evaluation of the record considered "as a whole," but that it is applied to a *new* record adduced before the court which may differ in significant respects from the record adduced before the agency. It is perfectly logical to test agency findings of fact by the rule of substantial evidence when it is

⁷² Hyder, *Some Difficulties in the Application of the Exceptions to the Spacing Rule in Texas*, 27 TEX. L. REV. 481, 490 (1949).

⁷³ "The record is to be considered as a whole, and it is for the court to determine what constitutes substantial evidence." *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 79, 161 S. W. (2d) 1022, 1029 (1942); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 349, 198 S. W. (2d) 424, 441 (1946); *Hawkins v. Texas Company*, 146 Tex. 511, 514, 209 S. W. (2d) 338, 340, (1948).

⁷⁴ Mr. Hyder contends that this rule places the agency at a disadvantage because private litigants are able to employ more experts than government agencies, and he fears that the courts may conclude that the overwhelming weight of the evidence is against the agency simply because the private litigants produced the most experts. This fear seems unwarranted. The weight of expert testimony is seldom, if ever, established merely on the basis of the *number* of experts appearing for each side.

applied to the very record upon which the agency based its findings. If the findings of the agency are not supported by substantial evidence heard by it, the order of the agency based upon such findings is clearly arbitrary. If the findings of the agency are supported by substantial evidence heard by it, it is simply a question of policy whether judicial review of fact issues should be so proscribed where constitutional rights are not involved. But there is little logic in restricting judicial review to a determination of whether the evidence adduced on a retrial of fact issues before the court contains substantial evidence to support the findings of the agency. The trial judge has no way of knowing, absent receipt in evidence of the transcript of the administrative proceedings,⁷⁵ what evidence was considered by the agency in arriving at its findings, or whether, had the agency heard the same evidence heard by him, it would have reached the same conclusion. Yet he must sustain the order if, on the trial of the issues before him, he finds that there is substantial evidence in the record to support the order, notwithstanding his own judicial evaluation of the evidence.

It is highly doubtful whether the legislature, in providing for a trial *de novo*, or for a suit or trial as in other civil causes, as is commonly the case in Texas,⁷⁶ contemplated any such limitation upon the judicial function. A trial *de novo* requires not only a full hearing of fact issues but the application of judicial judgment to the evidence so adduced. Of course, statutory presumptions (or presumptions implied by law) must play their accustomed role in the judicial evaluation of the facts, but to restrict the trial judge to a determination of whether the record adduced before him contains substantial evidence in support of an order under attack plainly violates the legislative enjoiner to conduct the trial, on review of administrative action, "as in other civil causes."

⁷⁵ Evidence heard by the agency is not *per se* admissible. "Whether it is admissible ... must depend upon its own merits under the general rules of evidence, and without regard to whether it had theretofore been introduced before the agency." *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 80, 161 S. W. (2d) 1022, 1030 (1942); *Hawkins v. Texas Company*, 146 Tex. 511, 209 S. W. (2d) 338 (1948).

⁷⁶ See notes 18 and 19, *supra*.

It is at this point that the use of the word "reasonably" in the statement of the rule becomes of special significance. It frequently has been overlooked that in the first full exposition of the substantial evidence rule in the *Gulf Land Co.* case⁷⁷ the Supreme Court said that in determining whether the order of the agency is unreasonable or arbitrary the trial court should consider whether the action of the agency in its determination of the facts "is reasonably supported by substantial evidence." In the *Hawkins* case⁷⁸ the court re-emphasized the use of the word "reasonably," pointing out that it gave to the judicial review a broader scope than it would have if some substantial evidence were regarded as sufficient to sustain the agency order. But the court did not elaborate upon this rather general statement, and trial courts remain today without positive guidance how to determine, as a matter of law, the reasonableness of the support afforded by substantial evidence in particular cases.

Under the rule of the *Hawkins* case, the trial court, after hearing all the evidence, must answer two inquiries: (1) does the record, considered as a whole, contain substantial evidence in support of the order of the agency, and (2) if so, does such evidence reasonably support the order (or, more properly, the findings of fact from which the order is derived). There must be some reliable, probative, relevant—*i.e.*, substantial—evidence in support of fact issues under challenge. That determination is *sine qua non*, but preliminary, to the decisive question of whether such substantial evidence, considered as a whole, reasonably supports the order of the agency. Hence, the basic problem is the meaning to be given to the words "reasonably supports" in the statement of the rule.

As has previously been pointed out, there is nothing to show that in adopting the phraseology of substantial evidence, Texas courts intended to work a radical, or any, departure from the scope of review which had been applied theretofore. Although "substantial evidence" was not mentioned in early decisions, the

⁷⁷ *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. (2d) 73 (1939)

⁷⁸ *Hawkins v. Texas Company*, 146 Tex. 511, 209 S. W. (2d) 338 (1948).

courts were always careful to accord weight to the findings of expert administrative bodies. Trial courts were not to substitute their judgment for that of the agency, *prima facie* validity was to be accorded the order of the agency, and the party complaining was to have the burden of establishing by convincing proof that the order of the agency was unreasonable or unjust. It is submitted that use of the words "reasonably supports" in the restatement of the rule by the Supreme Court in the *Hawkins* case denotes an equivalent test.

The substantial evidence rule in Texas administrative law should not be considered as a rule of evidence, but as a rule of reason—a statement of the balance between the judicial function of deciding controverted fact issues affecting private rights and the administrative function of regulating private activities within a field prescribed by the legislature. The court should not displace the agency in respect to such determinations; neither should it abnegate its own responsibilities. The trial judge should apply his "independent judgment" to the facts adduced before him on the trial of the cause; otherwise he will fail to fulfill his proper judicial function under statutes which assure parties a trial as in other civil causes. But the burden should be upon the party complaining of the administrative order to establish its unreasonableness by convincing proof, and the order, issued after a full and fair hearing, should be entitled to *prima facie* validity. The trial judge should not substitute his own judgment for that of an experienced agency; on the contrary, he should sustain the agency if, in his judgment, reasonable men, in fairness and justice to the complainant, could have arrived at the findings of fact implicit in the order or action of the agency. In short, he should give parties complainant approximately the scope of review which the Supreme Court of the United States has prescribed for cases in which constitutional rights depend upon fact determinations.

Acceptance of this interpretation of the rule of the *Hawkins* case would establish consistency between the earliest and the most

recent Texas cases dealing with scope of judicial review, eliminate the present disparity between public utility rate cases and other cases, and comply faithfully with the statutory scheme of *de novo* trial, or suit or trial as in other civil causes;⁷⁹ and, while according proper regard to the primacy of administrative agencies in the field of their special competence, it would supply that high quality of judicial review which is the best assurance against administrative abuse of private rights.⁸⁰

CONCLUSION

In its inception, the administrative process was bound to be viewed with considerable suspicion by the judiciary, and to be held in considerable disfavor by the bar. Although it may not have been regarded with that fine admixture of scorn and contempt in which the law judges held the chancellor before equity was accepted into the Anglo-American judicial system, its undoubted faults have been the source of genuine concern to the legal profession. The administrative system indisputably is here to stay. But if private rights are not to be submerged in the rising flood of agency rules and orders, constant attention must be given to the administrative process and constant effort must be expended to insure its development in a manner consistent with traditional concepts of fair play and justice.

The purpose of this paper has been to clarify a single aspect of the administrative process as it is developing in Texas law,⁸¹ and to point out the importance of an independent judicial evaluation

⁷⁹ And it should help to prevent further legislative enjoiners against the "substantial evidence rule." See note 69, *supra*.

⁸⁰ This rule may not be suitable for the review of certain types of administrative action in which exceptional discretion is properly lodged in the administrative agency or officer, such as in the use of state-owned property, the granting of a privilege by the state, or the exercise of summary action under the state's police power. In cases of this type, statutes may properly restrict the courts to a determination of whether the action in question is fraudulent, or wholly arbitrary or discriminatory. The issuance and revocation of licenses to operate jitneys on the public streets, to run saloons or pool halls, or to sell milk to the public, fall within these categories. See *Moore v. Cox*, 215 S. W. (2d) 666 (Tex. Civ. App. 1948), *Bradley v. Texas Liquor Control Board*, 108 S. W. (2d) 300 (Tex. Civ. App. 1937), and *Leach v. Coleman*, 188 S. W. (2d) 220 (Tex. Civ. App. 1945); and *cf. City of Coleman v. Rhone*, 222 S. W. (2d) 646 (Tex. Civ. App. 1949) and *Meaney v. Nueces County Nav. Dist. No. 1*, 222 S. W. (2d) 402 (Tex. Civ. App. 1949).

of fact issues where judicial review of administrative action is restricted to a new record adduced before the court. An obvious objection to this plan of review is that it necessitates a complete retrial of all fact issues. Witnesses who have testified at length before the agency in the administrative hearing must be recalled to repeat substantially the same evidence before the court. Furthermore, since whether the order of the agency is reasonably supported by substantial evidence adduced before the trial court is a question of law,⁸² appellate courts, in turn, must review the entire transcript of the evidence in the trial court. And the appellate court problem is the more serious now that appeals in such cases may be taken directly to the Supreme Court from the district court.⁸³

Another evil is implicit in this scheme of review. Since there must be a complete retrial of fact issues in cases appealed to the courts, the possibility exists that administrative agencies may be less inclined than otherwise properly to conduct complete administrative hearings. Evidence may be held back against the possibility of appeal to the courts, and agencies thus may become allied with their prosecutors against private parties. In short, the emphasis upon the judicial hearing may adversely affect the quality of the administrative hearing.

A practical solution of these difficulties is suggested by the statutory scheme of review now prescribed for orders of the Board of Insurance Commissioners relating to casualty insurance and orders of the Secretary of State under the Securities Act, in which review is restricted to the record adduced before the

⁸¹ In a subsequent issue, problems of practice and procedure before Texas administrative agencies, including such matters as the right to jury trial, the necessity for administrative fact findings, the right to compulsory process, etc., will be discussed.

⁸² *Thomas v. Stanolind Oil & Gas Co.*, 145 Tex. 270, 198 S. W. (2d) 420 (1946); *Trapp v. Shell Oil Co.*, 145 Tex. 323, 198 S. W. (2d) 424 (1946); *Hawkins v. Texas Company*, 146 Tex. 511, 209 S. W. (2d) 338 (1948); *Wrather v. Humble Oil & Refining Co.*, 147 Tex. 144, 214 S. W. (2d) 112 (1948).

⁸³ TEX. CONST., Art. V, § 3-b; TEX. REV. CIV. STAT. (Vernon, 1948) art. 1738a; *Railroad Commission v. Shell Oil Co.*, 146 Tex. 286, 206 S. W. (2d) 235 (1947); *Railroad Commission v. Sterling Oil & Refining Co.*, 147 Tex. 547, 218 S. W. (2d) 415 (1949); cf. *McGraw v. Teichman*, 147 Tex. 142, 214 S. W. (2d) 282 (1948).

agencies.⁸⁴ In the case of appeals from orders of the Secretary of State, the statute provides that the court may itself hear additional evidence. It is usually preferable, however, to provide that upon a showing of newly-discovered evidence, or for other good and sufficient reason, the court may remand the cause to the commission for the taking of further evidence and for reconsideration of its findings and order in the light thereof.⁸⁵ This plan would eliminate the retrial of fact issues in the district courts and would, in effect, establish them as first courts of appeal of administrative orders. Alternatively, appeal could be authorized from the administrative agency directly to the appellate courts, as in Oklahoma,⁸⁶ thereby further reducing the burden upon the courts. If it were considered desirable policy, the substantial evidence rule, as defined in federal practice, could then be applied where constitutional rights were not involved with full logic to the record adduced before the agency.

Before any such plan of review is given serious consideration in Texas, it is perfectly evident that an administrative procedure act will have to be adopted to insure full, fair, and legal hearings before administrative agencies. It would be folly to consider any plan of this sort, designed to relieve the courts of their present burden of retrying administrative law cases, until and unless adequate and certain methods of practice and procedure before administrative agencies are provided by law.⁸⁷ The next step in the improvement of the administrative system of Texas is the enactment of legislation designed to accomplish that end.

⁸⁴ See notes 66 and 67, *supra*.

⁸⁵ *New York v. United States*, 331 U. S. 284, 335 (1947).

⁸⁶ OKLA. CONST., Art. IX, § 20; OKLA. STATS. ANN., Title 52, § 113 (conservation of oil and gas), Title 17, § 34 (gas companies and pipe lines), Title 17, § 155 (public utility companies), Title 17, § 73 (transportation companies), etc.

⁸⁷ The Federal Administrative Procedure Act was enacted in 1946. On January 17, 1949, Senator Pat McCarran of Nevada, Chairman of the Senate Committee on the Judiciary, introduced Senate Bill 527 to provide uniform rules of practice and procedure in federal administrative agencies. The following states have enacted administrative procedure acts: California, North Dakota, Wisconsin, North Carolina, Ohio, Illinois, and Pennsylvania. The State Bar of Texas, through its Committee on Administrative Law, is seeking the enactment of similar legislation for Texas.