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SURVEY OF SOUTHWESTERN LAW FOR 1949

ADMINISTRATIVE LAW

I. POWERS

Texas. Whether the final determination that property is in fact a public nuisance subject to abatement can be delegated to local legislative or administrative boards was considered by the supreme court in *City of Houston v. Lurie.*[1] The court held that this question is essentially judicial in nature and "that the property owner is not to be deprived of his right to a judicial determination of the question whether his property is a public nuisance to be abated by demolition."

As pointed out in the opinion, a previous Texas case had declared:

> "The State, in the exercise of its public power, may denominate certain things to be public nuisances, and because of their having that character provide for their summary abatement. This power is limited to declaring only those things to be such nuisances which are so in fact, since even the State may not denounce that as a nuisance which is not in fact. Tiedeman's Limitation of Police Power, Section 122a. The police power is subordinate to the Constitution, as is every other power of the government. Where the legislature has found and defined, as expressed in its statute, a certain thing to be a public nuisance, only in clear cases would courts be warranted in going behind its findings and determining the contrary. But whether something not defined as a public nuisance by the statute is such under its general terms is undoubtedly a judicial question."[2]

Texas thus follows the general rule that "unless property is within that class which is designated and condemned by statute or the common law as a nuisance, the determination of the ques-

[1] ——Tex.——, 224 S. W. 2d. 871, 875 (1949).

[2] Stockwell v. State, 110 Tex. 550, 554, 555, 221 S. W. 932, 934 (1920), annotated in 12 A.L.R. 1116 (1921).

tion as to whether or not it is a nuisance becomes a judicial one, and its final determination cannot be effectuated by an administrative officer or board."[3]

Oklahoma. The Supreme Court of Oklahoma held inoperative, as unauthorized, a rule of the State Board of Medical Examiners which made ineligible for license a graduate of medical schools which were not located within the United States or Canada.[4] Petitioner, a graduate of Royal University of Florence, Italy, Faculty of Medicine, had made application to the medical board for permission to take the regular examination prescribed by law for a license to practice medicine and surgery. After the application was denied, he appealed to the appeal board designated by statute, which held that he was entitled to take the examination. On application of the medical board the supreme court granted writ of certiorari to review the action.

By statute the medical board was authorized to adopt rules necessary to carry into effect the provisions of the Medical Practice Act.[5] One of the provisions of the act was that the applicant must submit satisfactory evidence that he was a graduate of a legally chartered medical college or university whose requirements for graduation at the time of graduation should not be less than those prescribed by the Association of American Medical Colleges for that particular year.[6] Pursuant to the statutory grant of power, the medical board adopted rules. Rule 1 required that all applicants must have graduated from a class "A" school, as classified by the Association of American Medical Colleges; Rule 7, subsequently adopted, provided that since it was not possible to obtain proper information as to the standing of medical schools in foreign countries, graduates of schools not within the United States and Canada were not eligible for license.

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[3] See 39 Am. Jur. 295, *Nuisances*, sec. 15.

[4] Application of State Board of Medical Examiners, ——Okla.——, 206 P. 2d. 211 (1949).

[5] 59 OKLA. STAT. ANN. (Perm. Ed.) §§ 481-515.

[6] 59 OKLA. STAT. ANN. (Perm. Ed.) § 493.

The granting of the license was made mandatory when the statutory requirements were met and was not discretionary with the Medical Board. The statute did not require a diploma from a class "A" school as a condition precedent to taking the examination, but the rules did, and the question then was—did the rule have the force of law?

In declaring that these rules did not have the force of law, the court stated:

> "The only authorized basis for any rule is that it is a means to the accomplishment of the legislative purpose expressed in the statute and its quality is to be judged by the effect thereof when used. If conducive to such purpose it is authorized by the statute. If not so conducive it is not authorized by the statute and therefore without the force of law."[7]

It was held, therefore, that the applicant could not be debarred from applying because he did not have a diploma from a class "A" school.

In view of the present growth of administrative power, the following statement, which was quoted by the Oklahoma Supreme Court in this case, seems appropriate:

> "It is a fundamental principle of our system of government that the rights of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus. This principle ought not to be surrendered for convenience, or in effect nullified for the same expediency."[8]

New Mexico. "The legislature cannot delegate the power to make laws" but "the legislature still may enact laws to take effect when certain facts exist, and delegate to some other branch of the government the duty of determining the existence of such facts."[9] In a recent New Mexico case the court held that a statute[10] authorizing incorporated cities or towns to annex adjacent territories did not constitute an unlawful delegation of legislative power to a board of arbitrators created by the act; that the act

[7] 206 P. 2d. at 215.
[8] 42 Am. Jur. 342, *Public Administrative Law*, sec. 45.
[9] Cox v. City of Albuquerque, 53 N. M. 334, 207 P. 2d. 1017, 1022 (1949).
[10] N. M. Laws 1947, c. 211; N. M. STAT. 1941 ANN. §§ 14-615—14-620.

did not enforce compulsory arbitration on the parties involved; and that Article 9, Section 12, of the New Mexico Constitution was not violated by the residents of the annexed territory contributing in the form of taxes to the payment of pre-existing bonded indebtedness, in the creation of which the owners of the annexed lands did not have a vote or voice. The court laid down the test as whether the legislature intended to create a board and then confer on it legislative power "to grant or deny annexation upon the petition of interested parties, with or without reason, and regardless of the board's finding on a material fact ordered, following investigation"; or if the legislature "intended ascertainment of the fact to be investigated should conclude the question of annexation." The conclusion of the court was that the factual test was intended.

II. PROCEDURE

Texas. Board of Adjustment of City of Fort Worth v. Stovall[11] presents the problem whether a board of adjustment is a proper party to a suit filed to review one of its orders, and whether it has the right to appeal from a court judgment setting aside its order. The board had granted a permit to build an outdoor moving picture theatre, and Stovall filed suit in the district court to review the order. The board of adjustment was named defendant as well the applicant and its agents. The district court rendered judgment setting aside the order but dismissed the suit as to the defendants other than the board without prejudice. Only the board excepted to the judgment and gave notice of appeal. The court of civil appeals dismissed upon the ground that the board had no appealable interest in the subject matter of the controversy. This question had never been directly passed on in Texas by the supreme court.

In holding that the board had standing to appeal, the court noted:

[11] 147 Tex. 366, 216 S. W. 2d. 171 (1949), *rev'g* 211 S. W. 2d. 303 (Tex. Civ. App. 1948).

> "Articles 1011g through 1011j [TEX. REV. CIV. STAT. (Vernon, 1948)] are a virtual adoption of a standard zoning statute sponsored by the Federal Department of Commerce. In providing that the review of the orders of the board of adjustment shall be by certiorari, the statute differs from the majority of Texas statutes prescribing the procedure for the review of orders of administrative boards. These statutes usually provide that a petition shall be filed against the board or commission as defendant and expressly authorize appeals."[12]

The court stated that even though the review is designated by a different name and involves somewhat different procedure, it is not essentially different from the review contemplated by other statutes under which the right of a board or commission to appeal has apparently never been questioned. The public has an interest in upholding the board's order if it is valid. The board was a proper party defendant and may, in the public interest, take an appeal from an adverse decision in the trial court.

The court noted that decisions in other states are not harmonious on the question. Among the cases cited for a contrary view are two Louisiana decisions,[13] both of which involved appeals taken to a zoning board from a ruling of a city engineer. The Louisiana Supreme Court held that the Zoning Board of Appeal and Adjustment, which itself exercised quasi-judicial functions and was not a party to the proceeding, did not have a legal interest in maintaining its own decision and could not appeal from a judgment of a district court reversing it.

Oklahoma. Is a person denied due process of law when he is not furnished counsel in a hearing before an administrative board, acting under statutory authority, to revoke his license to practice dentistry? This question was answered in the negative by the Supreme Court of Oklahoma in *Bancroft v. Board of Governors of Registered Dentists of Oklahoma.*[14] On petition by Bancroft

[12] *Id.* at 369, 216 S. W. 2d. at 172.

[13] State v. Zoning Board of Appeal and Adjustment, 198 La. 766, 4 So. 2d. 822 (1941); State v. Zoning Board of Appeal and Adjustment, 198 La. 758, 4 So. 2d. 820 (1941).

[14] ——Okla.——, 210 P. 2d. 666 (1949).

for review of the findings and the order of the board revoking his license, the supreme court held that the hearing was not a criminal prosecution and that the board did not have a duty to furnish counsel. The dentist was entitled to have counsel of his own choosing if he desired, but he was not denied due process of law when counsel was not furnished him, even though he did not have the funds to pay an attorney. The record showed that Bancroft was questioned regarding counsel, and he replied that he did not have any, did not think one necessary, and also that he lacked funds with which to hire an attorney.

III. Judicial Review

Texas. The constitutionality of the Firemen's and Policemen's Civil Service Act[15] was tested in a suit filed by the City of Fort Worth in the nature of a class bill against all the members of the Fire and Police Departments.[16] The city contended that it was unconstitutional for the legislature to attempt to create a right of appeal to the courts from a decision of the civil service commission, as this would be in derogation of the separation of powers among the three branches of government. The act was held constitutional in this respect by the supreme court.

The lower courts had held part of the act invalid on the ground that the statute would permit an appeal of an indefinite suspension or dismissal to the district court, with power in that court to substitute its judgment and discretion, in a de novo trial, for that of the other branches of government and thus would constitute an invalid conferring of power on the judiciary. The supreme court pointed out that the discretion of the civil service commission was not made unlimited by the legislature, that the commission can order removal or suspension of an employee only after it has determined that he has been guilty of one or more of enumerated derelictions, that the commission must act reasonably and accord-

[15] Acts 1947, 50th Legis., c. 325; Tex. Rev. Civ. Stat. (Vernon, 1948) art. 1296 m.

[16] Fire Department of City of Ft. Worth v. City of Ft. Worth, 147 Tex. 505, 217 S. W. 2d. 664 (1949).

ing to law, and that its discretion is not beyond judicial review. The "trial de novo" as applied to administrative orders means a trial to determine if the order of the administrative body is "free of the taint of any illegality and is reasonably supported by substantial evidence." The court's power is limited to upholding or setting aside the order, and it cannot substitute its discretion for that of the administrative body. Although in effectuating its judgment the court might order the employee reinstated, the effect of such order would be only "to return the parties to the status they occupied before the challenged order was entered."

The question whether or not the supreme court has jurisdiction, on *direct appeal*, to pass upon the validity of an order of the Railroad Commission, not only from the view of constitutionality of the order but also of its support by substantial evidence, arose in *Railroad Commission v. Sterling Oil & Refining Company*.[17] The supreme court had previously held in the *Seeligson* case[18] that it did have jurisdiction of a direct appeal from the judgment of the trial court in reviewing the order of an administrative body in view of Section 3-b of Article V of the Texas Constitution, Article 1738a of TEX. REV. CIV. STAT. (VERNON, 1948), and Rule 499-a of the TEXAS RULES OF CIVIL PROCEDURE. In the *Sterling* case it was contended that the court did not have jurisdiction because the order was challenged on other than constitutional grounds and therefore was not a case involving "constitutional validity;" it was urged that the appeal could not be maintained under Rule 499-a since "it necessitates the bringing to this court of a statement of facts for purposes other than those provided in the rule." In holding that it did have jurisdiction the supreme court held that in reviewing the evidence it does not consider the preponderance of the evidence but only whether there is substantial evidence which reasonably supports the order of the commission.

[17] 147 Tex. 547, 218 S. W. 2d. 415 (1949).

[18] Railroad Commission of Texas v. Shell Oil Co., Inc., 146 Tex. 286, 206 S. W. 2d. 235 (1947).

The latter is a question of law and not one of fact, and therefore there was no violation of Rule 499-a.

The dissent contended that the amendment confers jurisdiction by direct appeal only if "constitutional validity" of an order is involved, not validity in the broad sense of being sufficiently supported by the facts. The *Seeligson* and the *Guardian Life*[19] cases were said to have involved the question whether an administrative order was authorized by statute. The dissent urged that these decisions involved "constitutional validity," and were not authority that the court has jurisdiction in a case where the question is merely whether or not the order is reasonably supported by substantial evidence.

On the question when the substantial evidence rule is applicable in review of administrative or executive orders, where the statute does not provide for full retrial of facts, three Texas decisions during the year are of importance.

The rule was held applicable in *Fire Department of City of Fort Worth v. Fort Worth,*[20] which has previously been discussed. In this case the court stated the general rule: "the extent of the judicial review of the order of the administrative agency, the Commission, is limited to an ascertainment of whether there is substantial evidence reasonably sufficient to support the challenged order."

Jones v. Marsh[21] resolved the conflict which had arisen in the courts of civil appeals with respect to the orders of a county judge in passing upon applications for licenses to sell beer—the *Saiz*[22] case holding that the substantial evidence rule did not apply and the *Peeler*[23] case stating that it did. In deciding that the substantial evidence rule was applicable, the court said that a "county judge, in passing upon an application for a license to sell beer, acts in an

[19] Board of Insurance Commissioners v. Guardian Life Insurance Co., 142 Tex. 630, 180 S. W. 2d. 906 (1944).

[20] *Supra* note 16.

[21] 148 Tex.———, 224 S. W. 2d. 198 (1949).

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

[23] State v. Peeler, 200 S. W. 2d. 874 (Tex. Civ. App. 1947).

administrative rather than a judicial capacity." The judge's order does not possess the finality of a judgment, since the application must still be submitted to the Texas Liquor Control Board, where the license is to be issued if the applicant is entitled to it, but may be refused, under certain conditions, even though approved by the county judge. "The hearing before the county judge is not the trial of a right or title; it is a step in the administrative process by which a permit or license, which is a mere privilege, may be procured."[24]

The court held that under the facts of *City of Houston v. Lurie*,[25] previously discussed, the substantial evidence rule would not be applied. The court held that the final determination that property is in fact a public nuisance subject to abatement is a judicial question and cannot be delegated to local legislative or administrative bodies. "It may well be doubted that a limited review of the facts, as under the substantial evidence rule, would amount to a judicial determination of the justiciable question here involved. Trial under that rule would not establish whether or not the buildings are in fact nuisances, 'in the same manner as any other facts'."[26]

Arkansas. The proper scope of judicial review of fact findings of the Arkansas Public Service Commission arose in two cases last year. In *Wisinger v. Stewart*[27] the Supreme Court of Arkansas discussed statutory background and stated that the court tries the case "de novo" and renders "such judgment as appears to be warranted and required by the testimony." However, the court emphasized that "de novo" review by the court does not mean that it should proceed as if the commission did not exist and had never held a hearing. The court said its proper task is "to inquire whether the determination of the commission was contrary to the weight of the evidence," and that the order of the commission

[24] 224 S. W. 2d. at 202.

[25] *Supra* note 1.

[26] 224 S. W. 2d. at 875, 876.

[27] ———Ark.———, 223 S. W. 2d. 604 (1949).

should be upheld unless it was against the weight of the evidence.

In a second case,[28] in which the rule was applied, the court approved the order of the public service commission, subject to modifications, stating that the findings of fact by the commission were not contrary to the weight of the evidence.

In several cases involving appeals from orders of the Workmen's Compensation Board the scope of judicial review of its orders appears to be whether the findings were supported by sufficient evidence.[29] In *Green v. Lion Oil Company*[30] the court said,

> "If the Commission's finding that appellant sustained such an injury is supported by substantial evidence, the trial court erred in reversing and setting aside the award of the commission. It is not the province or duty of either the circuit court or this court on appeal to try de novo cases heard by the Workmen's Compensation Commission."

The court further stated:

> "It is also well settled that the circuit court on appeal from the commission and this court on appeal from the circuit court must give to the findings of fact by the Commission the same force and effect as the verdict of a jury or of the circuit court sitting as a jury.... In determining whether there is sufficient evidence to support the award, both the circuit court and this court on appeal must weigh the testimony in the strongest light in favor of the commission's findings."[31]

This case was cited and followed in *Campbell v. Athletic Mining & Smelting Company*,[32] where the court stated that the "question is therefore not whether the testimony would have supported a finding contrary to the one made, but rather whether it supports the finding which was made."

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[28] Missouri Pacific Transportation Company v. Inter City Transit Company, ——— Ark.———, 224 S. W. 2d. 372 (1949).

[29] H. C. Price Construction Co. v. Southern, ———Ark.———, 224 S. W. 2d. 358 (1949); Brook's Inc. v. Claywell, ———Ark.———, 224 S. W. 2d. 37 (1949); Campbell v. Athletic Mining & Smelting Co., ———Ark.———, 223 S. W. 2d. 499 (1949); Green v. Lion Oil Co., ———Ark.———, 220 S. W. 2d. 409 (1949); Dundee Woolen Mills v. Chism, ———Ark.———, 219 S. W. 2d. 628 (1949).

[30] 220 S. W. 2d. at 411.

[31] *Ibid.*

[32] *Supra* note 29 at 501.

New Mexico. In a case of first impression the Supreme Court of New Mexico held that, in the absence of statute so authorizing, a cause could not be remanded to an administrative board for further proceedings.[33] The court held that "in a proceeding for statutory review, the court must act within the bounds of the statute conferring its jurisdiction to review and where the measure of its power is to determine whether the questioned order is unlawful or unreasonable, ordinarily it can only approve or vacate the order."

After an exhaustive study of the question the court pointed out that the cases do not support authorities[34] whose language is "to the effect that the general rule, even in the absence of statute, affirms the right of the reviewing court to remand the cause for further proceedings before the administrative board whose order is being reviewed." The court further stated: "Indeed, so far as the writer's search goes (and it has been extensive) not a single case has been found in which the cause was remanded to an administrative board or authority for further porceedings as, for instance, taking of additional testimony, that lacks the sanction of statutory or constitutional authorization for the remand."[35] The court held that the case could not be remanded "for the taking of additional testimony preliminary to deciding reasonableness or lawfulness of the order under review, as enjoined by the statute." The effect of a judgment vacating the administrative order was to remand the cause to the administrative board for such further proceedings as might lie within its statutory powers.

The constitutionality of Chapter 128, New Mexico Session Laws of 1945, was challenged in two cases,[36] but in neither was there

[33] State ex rel. Transcontinental Bus Service, Inc. v. Carmody, 53 N. M. 367, 208 P. 2d. 1073. 1076 (1949).

[34] 42 Am. Jur. 689; *Public Administrative Law*, § 248; 153 A.L.R. 1028 (1944); 2 VON BAUR, FEDERAL ADMINISTRATIVE LAW (1942) § 788.

[35] 208 P. 2d. at 1079.

[36] American Refrigerator Transit Co. v. Shepard, State Treasurer, 53 N. M. 271, 206 P. 2d. 551 (1949); Associated Petroleum Transport Limited v. Shepard, 53 N. M. 52, 201 P. 2d. 772 (1949).

a decision on the merits. The act involved a tax on the gross receipts for the use of railroad cars, such receipts being confined to those derived from New Mexico mileage only. In the *Associated Petroleum Transport* case the holding was that the plaintiffs had not exhausted their statutory remedy before the administrative board and the trial court was not authorized to determine the merits of the case.

In the *American Refrigerator* case the court, upon motion for rehearing, withdrew the opinion filed before the decision in the *Associated Petroleum* case had been rendered and substituted another saying that the decision in the latter case "would have proved decisive of the appeal in this case since the plaintiff herein did not exhaust its statutory remedies before the State Tax Commission before filing the suit out of which this appeal arose."[37] The court said that before the aid of equity is sought, the statutory remedies must be exhausted.

It is interesting to note, however, that the first point decided by the court in the *Associated Petroleum* case was whether the taxpayer's protest, required by statute, was timely filed with the State Tax Commission. The court held that "the complaint and protest were not timely filed with the State Tax Commission as required by the Act, and thereafter the Commission had no jurisdiction to hear it."[38] Since this decision has been followed by the later *American Refrigerator* opinion, it appears to establish that a taxpayer in New Mexico who does not timely exhaust his remedies provided before an administrative board to secure the correct assessment of a tax cannot thereafter assert its invalidity before a judicial tribunal.

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[37] 206 P. 2d. at 552.
[38] 201 P. 2d. at 774.