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THE SUBSTANTIAL EVIDENCE RULE: TEXAS VERSION

*Lennart V. Larson**

I. INTRODUCTION

THE world knows Texas as having a penchant for claiming the "biggest," the "most numerous," or the "best" of a variety of things. One hesitates to characterize the Texas substantial evidence rule by one of these superlatives. Perhaps it is sufficient to say that the Texas rule is "different" and to appraise it after explanation.

A fundamental problem in administrative law is the extent to which determinations of administrative agencies should be subject to judicial review. The problem is one of allowing to the agencies full and effective use of their discretionary, "expert" powers and yet of affording judicial relief where erroneous or unwarranted action is taken. Usually the statute establishing an agency will indicate the scope of judicial review to be exercised. But frequently no provision for appeal is made, and the review will depend upon the type of suit instituted by the person aggrieved. At one extreme the review may be limited to questions of law on the record made before the agency; at the other extreme the review may be a retrial of the facts and law of the case.

In the federal domain the "substantial evidence rule" has been a familiar one, expressed in numerous statutes.¹ Under it the circuit courts of appeal have reviewed the record for errors of law and have accepted as "conclusive" administrative findings of fact if supported by some substantial evidence. The evidence did not have to meet technical requirements of competency, but it had to

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¹ Some nineteen of these statutes are collected in Stason, "*Substantial Evidence*" in *Administrative Law*, 89 U. Pa. L. Rev. 1026 (1941). See, for example, 49 STAT. 449 (1935), 29 U.S.C. 1946 ed. § 160(f) (National Labor Relations Act).

be more than a scintilla and had to have "rational probative force."² Because the rule was thought to make an administrative finding impregnable where supported by a page of testimony, even though contrary evidence was overwhelming in quantity and quality, Sections 7(c) and 10 (e) were included in the Federal Administrative Procedure Act.³ These sections prescribed that administrative orders were to be sustained only if supported by substantial evidence on the whole record. Thus, if evidence supporting a material finding is rendered insubstantial by opposing evidence, the reviewing court is authorized to reverse.⁴

The Texas substantial evidence rule may be described, roughly, as superimposing the federal substantial evidence rule (as modified by the Federal Administrative Procedure Act) upon a trial *de novo*. Undoubtedly this sounds anomalous, an impression that will not entirely disappear with the delineation of the rule in the succeeding pages. In order to draw inferences as to how widespread the rule is in its application, certain recent cases will be considered, and the many Texas statutes providing for appeals from administrative agencies will be examined and compared. The importance of the rule in its effect upon practice before administrative agencies can hardly be exaggerated.

2. NATURE OF THE TEXAS SUBSTANTIAL EVIDENCE RULE

A definitive statement of the Texas substantial evidence rule has been made in recent years in three decisions of the Texas Supreme Court. Questions still remain, but the broad outlines are clear.

In *Trapp v. Shell Oil Company*⁵ the Railroad Commission granted a permit to Trapp and others to drill a second oil well on a 1.77-acre tract in East Texas. The permit issued, after hearing,

² Consolidated Edison Co. v. NLRB, 305 U. S. 197 (1938).

³ 60 STAT. 237 (1946), 5 U.S.C. 1946 ed. § 1001 *et seq.*

⁴ Universal Camera Corporation v. NLRB, 340 U. S. 474 (1951); NLRB v. Pittsburgh S. S. Company, 340 U. S. 498 (1951).

⁵ 145 Tex. 323, 198 S. W. 2d 424 (1946). Chief Justice Alexander dissented.

as an exception to Rule 37,⁶ promulgated by the Commission under the oil and gas conservation statutes. Plaintiffs, adjoining leaseholders, filed suit to cancel the permit. The district court denied relief, but the court of civil appeals reversed and remanded. On re-trial the district court cancelled the permit, and the civil appeals court affirmed. On further appeal the Texas Supreme Court reversed and sustained the permit granted by the Commission.

The main issue, causing difficulty and confusion in the courts below, was the nature of the proceeding in the district court under *Texas Revised Civil Statutes* (Vernon, 1948), Article 6049c, Section 8:

“Any interested person affected by the conservation laws . . . or by any rule, regulation or order made . . . by the Commission . . . and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County . . . against the Commission . . . to test the validity of said laws, regulations or orders. . . . In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid.”

Justice Slatton, speaking for the court, addressed himself to a clarification of the substantial evidence rule. Three earlier decisions⁷ were reviewed, and in so far as they were inconsistent, the *Gulf-Atlantic* case⁸ was accepted as stating correct doctrine.

⁶ The pertinent portion of the Rule reads as follows:

“No well for oil or gas shall hereafter be drilled in said East Texas field nearer than 660 feet to any other completed or drilling well on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line, or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property.”

⁷ *Marrs v. Railroad Commission*, 142 Tex. 293, 177 S. W. 2d 941 (1944); *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 161 S. W. 2d 1022 (1942) (also known as *Trem Carr* case); *Gulf Land Co. v. Atlantic Refining Co.*, 134 Tex. 59, 131 S. W. 2d 73 (1939).

⁸ *Supra* note 7.

The latter case had emphasized the necessity for treating the Railroad Commission as the primary fact-finding agency and the danger that uniformity of administration of the oil and gas conservation laws would be sacrificed if the district court were allowed to substitute its findings of fact. The suit under Article 6049c, Section 8, had been regarded as a special statutory action in which the Commission's order should not be set aside unless it was "illegal, unreasonable or arbitrary." So far as findings of fact were concerned, the order was not illegal, unreasonable or arbitrary if it was "reasonably supported by substantial evidence."

Justice Slatton's opinion gave further particulars concerning the substantial evidence rule. The proceedings in the district court were to be considered as a whole in deciding whether or not substantial evidence reasonably supported the action of the Commission. The evidence on one side was not to be considered to the exclusion of that introduced by the opposing side. The district court did not have to give weight to incredible, perjured or unreasonable testimony, and a scintilla of evidence was insufficient to satisfy the rule. All competent evidence was admissible in the trial, not being limited to that offered before the Commission. The contesting parties had full rights of cross-examination and impeachment.

The merits of the case involved a settlement of conflicting property rights. The final judgment was that substantial evidence on the whole record made in the district court reasonably supported the Commission in making an exception to Rule 37 in order to prevent waste and confiscation of property.

*Thomas v. Stanolind Oil & Gas Co.*⁹ was a case in which the district court cancelled a permit granted by the Railroad Commission to drill a second well on a tract of land as an exception to Rule 37. The civil appeals court affirmed, but the supreme court reversed on the ground that substantial evidence in the district court (the testimony of one witness) reasonably supported the

⁹ 145 Tex. 270, 198 S. W. 2d 420 (1946). Justice Hickman wrote the opinion of the court. Chief Justice Alexander dissented.

order of the Commission. The *Thomas* decision includes the following significant statement:

"... [T]rial courts and courts of civil appeal are clothed with authority, not possessed by this court, to set aside . . . findings if they are thought to be against the great weight and overwhelming preponderance of the evidence. But those courts are not clothed with authority to set aside fact findings of an administrative agency made within the scope of its statutory powers on that ground. The Legislature has clothed administrative agencies with special powers to perform special functions *and in reviewing fact findings of such agencies no question of the preponderance of evidence is involved.* The question is whether or not there is any substantial evidence affording reasonable support for such findings and the orders entered thereunder. *That is a question of law* of which this court, along with the lower courts, has jurisdiction. . . ."¹⁰

In *Hawkins v. Texas Co.*¹¹ the trial court cancelled a permit to drill a tenth oil well on a tract, which had been granted as an exception to Rule 37. The judgment was affirmed by the court of civil appeals and the supreme court because no substantial evidence supported the Commission's order. The only supporting evidence was testimony espousing the "more wells, more oil" theory of drilling. This theory had been rejected in earlier cases as creating an exception which would destroy Rule 37. To sustain an exception under the Rule, coming within the standard "to prevent waste or confiscation," an applicant had to show special circumstances affecting his tract not common to adjacent tracts in the field. The court reiterated that the district court is to determine "from all the evidence before it, the entire record, whether the Commission's action is or is not reasonably supported by substantial evidence," that scrutiny of the evidence is not to be limited to one side alone, and that the trial is not on the preponderance of evidence.

The *Trapp*, *Thomas* and *Hawkins* cases are not entirely clear

¹⁰ *Id.* at 273, 198 S. W. 2d at 421. Italics added.

¹¹ 146 Tex. 511, 209 S. W. 2d 338 (1948).

on the question whether the district court may pass upon the credibility of witnesses. It is to be doubted that the court may do so. The statement that incredible, perjured or unreasonable testimony may be rejected probably refers to evidence which is clearly unworthy of any consideration. If the district court may pass upon credibility of witnesses in the sense of weighing testimony, it would be substituting its judgment for that of the Railroad Commission, and the trial would be on the preponderance of evidence, something expressly negated by the Texas Supreme Court.¹²

The late Chief Justice Alexander wrote a powerful dissent in the *Trapp* case, repeating views expressed by him for a unanimous court in the *Trem Carr* and *Marrs* cases.¹³ He felt that the latter cases were more binding than the *Gulf-Atlantic* decision and established that an independent trial of facts and law should be had under Article 6049c, Section 8. The "right to file a suit" could only mean a trial in which evidence and testimony are weighed and a judgment reached on the merits. The sentence putting the burden of proof on the complaining party was appropriate only on a construction of the statute allowing an independent trial on the preponderance of evidence. An unwise rule was being adopted because it would be an administrative agency with poor resources that could not arrange for some substantial evidence to support its action.

The Chief Justice cited the well-known *Crowell* and *Ben Avon Borough* cases¹⁴ as requiring, under the Federal Constitution, an independent trial of the facts and law where the issue of confiscation is raised. While these cases have not been overruled, their

¹² But see *Texas Liquor Control Board v. Saiz*, 220 S. W. 2d 502, 510 (Tex. Civ. App. 1949) ("As has been stated, the duty of judging the credibility of witnesses is still incumbent on the district judge, even though he may be circumscribed by the substantial evidence rule."); *State v. Peeler*, 200 S. W. 2d 874, 879 (Tex. Civ. App. 1947) ("The findings of fact by the county judge is [sic] not binding on the district judge unless the district court believes them to be true...").

¹³ Cited *supra* note 7.

¹⁴ *Crowell v. Benson*, 285 U. S. 22 (1932); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287 (1920). *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38 (1936), could also have been cited. *Cf. Acker v. United States*, 298 U. S. 426 (1936).

authority has been seriously weakened by later decisions of the United States Supreme Court.¹⁵ Calling confiscation a constitutional fact which must be tried independently in court leads to difficulties in that virtually all orders of important administrative agencies affect property rights and can be claimed to result in confiscation.

3. EXTENT OF APPLICATION OF RULE

Recent Decisions. While the substantial evidence rule was developed primarily in cases involving orders of the Railroad Commission in the oil and gas industry, its reason and policy extend to other agencies and industries. Several cases decided since the *Trapp* decision support this proposition. The wording of the statutes construed is of great importance.

In *Fire Department v. City of Fort Worth*¹⁶ suit was brought to have declared unconstitutional a statute¹⁷ establishing a civil service system for policemen and firemen in cities of over 10,000 population. Section 18 of the act provided that a fireman or policeman dissatisfied with a disciplinary order could file a petition in the district court "asking that his order of suspension or dismissal be set aside . . . [and] that he be reinstated"; such case was to "be tried de novo." The section was held unconstitutional by the court of civil appeals on the ground that it imposed upon the district court administrative, as distinguished from judicial, functions. The supreme court reversed, noting that the civil service commission was restricted in the causes for discipline and describing the district court's function as follows:

"The extent of such review has been rather generally held to be limited to an ascertainment of whether there was substantial evidence reasonably sufficient to support the challenged order. . . . There is

¹⁵ *New York v. United States*, 331 U. S. 284 (1947); *Railroad Comm. v. Rowan and Nichols Oil Co.*, 310 U. S. 573 (1940), 311 U. S. 614 (1941); *id.*, 311 U. S. 570 (1941).

¹⁶ 147 Tex. 505, 217 S. W. 2d 664 (1949), *rev'g* 213 S. W. 2d 347 (Tex. Civ. App. 1948).

¹⁷ TEX. REV. CIV. STAT. (Vernon, 1948) art. 1269m, §§ 1-28.

nothing in Section 18 to suggest that the district court is empowered to do more. Although the statute provides for a trial de novo, this term as applied to reviews of administrative orders has come to have a well-defined significance in the decisions of this state, and as a rule has been taken to mean a trial to determine only the issues of whether the agency's ruling is free of the taint of any illegality and is reasonably supported by substantial evidence."¹⁸

The court went on to explain that the district court's action under the substantial evidence rule was limited to sustaining or vacating the commission's order; the district court could not exercise administrative powers by substituting its discretion for that of the commission.

In *Jones v. Marsh*¹⁹ an application for a retail license to sell beer had been denied by a county judge acting as an administrative tribunal in enforcing the state liquor laws. Appeal was taken to the district court under a statute providing that "the trial shall be de novo under the same rules as ordinary civil suits."²⁰ The district court applied the substantial evidence rule and upheld the county judge. The judgment was affirmed by the court of civil appeals and by the Texas Supreme Court.

The remarkable feature of the case was that the statute could hardly have prescribed in plainer terms an independent trial of the facts and law in the district court. "Trial de novo" is the apt term for such a trial, and it was reinforced by the statement that the proceedings should be "under the same rules as ordinary civil suits." Yet the substantial evidence rule was held applicable.

The court explained its holding as follows:

"... The statute does not expressly provide that there shall be in district court a full retrial of the facts as if there had been no findings made by the county judge, nor does the statute specify what issue or issues shall be tried in the district court. It may, therefore, reasonably be concluded, in view of the subject matter involved and the

¹⁸ 147 Tex. at 510, 217 S. W. 2d at 666.

¹⁹ 148 Tex. 362, 224 S. W. 2d 198 (1949), *aff'g* 223 S. W. 2d 29 (Tex. Civ. App. 1949).

²⁰ TEX. PEN. CODE (Vernon, 1948) arts. 666-14, 667-6.

nature of the order to be reviewed, that only a limited review is intended, and that in so far as the facts which are the basis for the order of the county judge are concerned the question or issue to be determined in the district court is whether or not the findings of the county judge are reasonably supported by substantial evidence. Such a trial is one kind of a trial de novo, and the somewhat limited trial can be held, as the statute requires, under the rules applicable to ordinary civil suits."²¹

The court went on to say that the license in question was a mere privilege and that in the interest of efficiency the fact findings of the administrative agency in this type of proceeding "are usually subject to a limited, rather than to a full, judicial review. . . ."²² The substantial evidence rule was restated as applying to the evidence introduced in the trial court and as requiring the trial and appellate courts "to determine as a matter of law the reasonableness of the support afforded by substantial evidence . . . [taking] into consideration all the evidence."²³ The *Jones* case settled the question of application of the substantial evidence rule under the liquor control law, a point on which conflict had arisen in the courts of civil appeal.²⁴

*Department of Public Safety v. Robertson*²⁵ involved a refusal to issue a driver's license on the ground of defective vision. Robertson filed a petition for hearing in a county court under a statute which directed the court "to take testimony and examine into the facts of the case" and to "determine whether petitioner is entitled to a license."²⁶ A proviso stated that "the trial . . . shall be a trial de novo and the licensee shall have the right of trial by jury." The

²¹ 148 Tex. at 367, 224 S. W. 2d at 201.

²² *Ibid.*

²³ *Id.* at 369, 224 S. W. 2d at 202.

²⁴ In accord with the *Jones* case: *Corder v. Delgado*, 234 S. W. 2d 268 (Tex. Civ. App. 1950); *Ex parte Graham*, 226 S. W. 2d 247 (Tex. Civ. App. 1950); *Ex parte Velasco*, 225 S. W. 2d 921 (Tex. Civ. App. 1949); *Ramos v. Austin*, 220 S. W. 2d 528 (Tex. Civ. App. 1949); *Carson v. State*, 216 S. W. 2d 836 (Tex. Civ. App. 1949); *State v. Peeler*, 200 S. W. 2d 874 (Tex. Civ. App. 1947). *Contra*: *Texas Liquor Control Board v. Saiz*, 220 S. W. 2d 502 (Tex. Civ. App. 1949).

²⁵ 203 S. W. 2d 950 (Tex. Civ. App. 1947).

²⁶ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6687b, § 31.

county court held an independent trial and ordered the issuance of a license. The judgment was reversed because the substantial evidence rule should have been applied and would have resulted in sustaining the Department of Public Safety. The court commented that the license sought was not a property right but a mere privilege and that the Department was vested with wide discretion.

*Consolidated Chemical Industries v. Railroad Commission*²⁷ was a case in which plaintiff common carrier sued to set aside an order allowing a competitor to lower its rate on sulphuric acid. Suit was brought under a statute²⁸ permitting any party dissatisfied with any rate or order to file a petition in the district court of Travis County setting forth objections. The suit was to "be tried and determined as other civil causes in said court." The order of the Railroad Commission was sustained in the district and civil appeals courts on an application of the substantial evidence rule. While the statute was not as explicit as in the *Robertson and Jones* cases, it still appeared to allow an independent trial of the facts and law.

Several cases involving grant or revocation of certificates of convenience and necessity have reached the appellate courts. For example, in *Kerrville Bus Company v. Continental Bus System*²⁹ and in *Southwestern Greyhound Lines v. Railroad Commission*³⁰ suits were brought to set aside grants of certificates. A statute permitted filing of a petition in the district court and declared that "said action . . . shall be tried and determined as other civil causes in said court."³¹ The burden of proof was placed on petitioner "to show by a preponderance of evidence" that the orders complained of were unreasonable or unjust. In both cases the substantial evidence rule was applied, and petitioners were denied relief. Other decisions have applied the rule under the same or similar statutes.³²

²⁷ 201 S. W. 2d 124 (Tex. Civ. App. 1947) *er. ref. n.r.e.*

²⁸ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6453.

²⁹ 208 S. W. 2d 586 (Tex. Civ. App. 1947) *er. ref. n.r.e.*

³⁰ 208 S. W. 2d 593 (Tex. Civ. App. 1947) *er. ref. n.r.e.*

³¹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 911a, § 17.

³² *Stotts v. Railroad Commission*, 236 S. W. 2d 210 (Tex. Civ. App. 1951) *er. ref.*

In *Board of Firemen's Relief v. Marks*³³ the Firemen's Pension Commissioner of Houston had denied plaintiff's claim for a total disability pension. The pertinent statute merely allowed "an appeal" to the district court of Travis County.³⁴ The district court set aside the decision of the Commissioner on the ground that it was not reasonably supported by substantial evidence, and this judgment was affirmed. The court of civil appeals assumed throughout its opinion that the substantial evidence rule was the proper measure of judicial review.

Recent instances may be cited where resort has been permitted to the district court under the substantial evidence rule although the legislation governing the challenged administrative body did not mention the right of appeal. In *City of Amarillo v. Hancock*³⁵ plaintiff was demoted from captain to driver in the Amarillo Fire Department on complaint of negligence by the Fire Chief. The district court vacated the demotion order of the civil service commission because it was not reasonably supported by substantial evidence. The statute governing discipline of employees in the Fire Department did not provide for appeal from demotions.³⁶ Nevertheless, it was held "well-settled by the decisions that, even without express statutory authority, the orders entered by an administrative body, such as the Civil Service Commission of the City of Amarillo, are subject to judicial review."³⁷

*Patillo v. County School Trustees of Wilson County*³⁸ involved a different type of administrative agency but came to the same

(cancellation of certificates under TEX. REV. CIV. STAT. (Vernon, 1948) art. 911b, § 12(b)); *Wattenburger v. Railroad Commission*, 231 S. W. 2d 924 (Tex. Civ. App. 1950) *er. ref. n.r.e.* (cancellation of certificate under TEX. REV. CIV. STAT. (Vernon, 1948) art. 911b, § 20); *Texas & Pacific Ry. Co. v. Railroad Comm.*, 213 S. W. 2d 99 (Tex. Civ. App. 1948) *er. ref. n.r.e.* (grant of specialized motor carrier certificate).

³³ 237 S. W. 2d 420 (Tex. Civ. App. 1951) *er. granted.*

³⁴ TEX. REV. CIV. STAT. (Vernon, 1948) art. 6243e, § 18.

³⁵ 233 S. W. 2d 339 (Tex. Civ. App. 1950) *er. granted.*

³⁶ TEX. REV. CIV. STAT. (Vernon, 1948) art. 1269m, §§ 18, 19.

³⁷ 233 S. W. 2d at 341. *Acc.*, *White v. Bolner*, 223 S. W. 2d 686 (Tex. Civ. App. 1949) *er. ref.* (ouster by mayor of commissioners of housing authority under TEX. REV. CIV. STAT. (Vernon, 1948) art. 1269k, § 7; no mention of appeal in statute).

³⁸ 235 S. W. 2d 924 (Tex. Civ. App. 1951).

conclusion. Defendant board of trustees denied a petition to detach certain territory from one district and to annex it to another, and a suit was brought to have the refusal declared an abuse of discretion. No provision for appeal was to be found in the statutes,³⁹ but the court said, "In determining whether an action of an administrative agency such as a county board of school trustees is a valid exercise of a discretionary power or an arbitrary action the courts will generally apply the 'substantial evidence' rule."⁴⁰

The Statutes. The decisions indicate that the substantial evidence rule is to be applied wherever an appeals statute seems to allow a full judicial trial. One may well ask, how common are such statutes in Texas? The answer is that the Texas Legislature has repeatedly enacted statutes of this type.

Examination of the statute books reveals that by far the most common mode of appeal from administrative agencies in Texas is by suit in a district or (much less commonly) county court. The language varies, but some patterns may be noted. A great number of the statutes provide for a "trial de novo."⁴¹ Almost as large a group provide for an action like that of "an ordinary civil suit" or with rules as in "other civil suits."⁴² Some of the statutes com-

³⁹ TEX. REV. CIV. STAT. (Vernon, 1948) art. 2742f, § 1.

⁴⁰ 235 S. W. 2d at 925.

⁴¹ TEX. PEN. CODE (Vernon, 1948) arts. 614-1 (a) (Commissioner of Labor Statistics, regulation of boxing and wrestling, licenses); 734b, § 16 (Board of Hairdressers and Cosmetologists, regulation of beauty schools and operators). TEX. REV. CIV. STAT. (Vernon, 1948) arts. 1269m, § 18 (civil service commission, dismissal of employee); 1524a, § 7 (Banking Commissioner, disapproval of securities); 1524h (municipal governing body, rents, charges, operations of housing corporation); 2372g-1, § 2 (commissioners court, awards to injured employees); 4582a, § 4 (State Board of Embalming and State Board of Health, funeral directors' licenses); 4859f, § 3 (Board of Insurance Commissioners, regulation of mutual assessment life insurance companies); 4764c, § 12 (Tex. Acts 1949, c. 81) (same, regulation of credit, life, health, accident insurance); 4860a-20, § 2a(t) (same, regulation of county mutual insurance companies); 5062b, § 18 (same, recording agents' and solicitors' licenses); 5221b-4 (amended, Tex. Acts 1949, c. 148) (Unemployment Compensation Commission); 5274 (Board of Examiners of State Land Surveyors, licenses); 6674s, §§ 11, 16 (Industrial Accident Board, workmen's compensation insurance for highway employees); 6687b, § 31 (Department of Public Safety, drivers' licenses); 7628 (commissioners court, organization of water improvement district); 7819 (same, water control and preservation districts); 7979 (same, organization of levee improvement districts); 8307, § 5 (Industrial Accident Board, Workmen's Compensation Act).

⁴² TEX. REV. CIV. STAT. (Vernon, 1948) arts. 135a-1, § 5 (Commissioner of Agricul-

bine these expressions.⁴³ Many of the statutes are less explicit and authorize a petition or suit to try the issue decided by the administrative agency.⁴⁴ The inference would seem to be justified that an independent trial was contemplated. Another large group of statutes allow an "appeal" or "review" or "redress" in the district or county court and fail to supply further details.⁴⁵ Frequently the

ture, quarantine of areas for insect pests and plant diseases); 911a, § 17 (Railroad Commission, regulation of motor bus transportation); 911b, § 20 (same, regulation of motor carriers); 911d, § 14 (same, regulation of motor bus ticket brokers, licenses); 3271a, § 22 (Board of Registration for Professional Engineers, certificates); 4549 (Board of Dental Examiners, licenses); 4893 (Board of Insurance Commissioners, rates and forms of insurance policies); 5068b, § 4 (same, agents' licenses); 5180 (Commissioner of Labor Statistics, correction of industrial conditions); 6049a, § 12 (Railroad Commission, regulation of pipe lines); 6059 (same, regulation of gas utilities); 6453 (same, regulation of railroads); 7530, 7564, 7567, 7590 (Board of Water Engineers, rates, orders and regulations); 7880-18, -21 (commissioners court or Board of Water Engineers, organization of water control and improvement districts).

⁴³ TEX. PEN. CODE (Vernon, 1948) arts. 614-17(c) (Commissioner of Labor Statistics, regulation of boxing and wrestling, licenses); 666-14 (Liquor Control Board and Administrator, licenses); 667-6 (same); 667-22 (same); 752c, § 5 (Board of Dental Examiners, licenses). TEX. REV. CIV. STAT. (Vernon, 1948) arts. 46e-11 (Board of Adjustment or zoning board, zoning regulations); 5221a-6, § 7 (Tex. Acts 1949, c. 245) (Commissioner of Labor Statistics, licenses of private employment agents); 6053, §§ 15, 16 (Railroad Commission, licenses); 7065b-16 (Comptroller, fuel dealers' licenses).

⁴⁴ TEX. PEN. CODE (Vernon, 1948) arts. 734a, §§ 9, 22-A (Board of Barber Examiners, regulation of barbers and barbers' colleges, licenses); 881b, § 8 (Game, Fish and Oyster Commissioner, regulations); 1525a, § 11 (Live Stock Sanitary Commission, dipping of sheep and cattle, injunction); 1525c, § 23 (same, tick eradication). TEX. REV. CIV. STAT. (Vernon, 1948) arts. 600a, §§ 8, 24, 28 (Secretary of State, regulation of securities, dealers' licenses); 881a-3 (Banking Commissioner, regulation of building and loan associations, mandamus); 1105b, §§ 9, 14 (assessments for improvements); 1302a, § 20 (Board of Insurance Commissioners, certificate of authority to do business); 2922-19 (Tex. Acts 1949, c. 334, art. IX) (Gilmer-Akin Law) (Central Education Agency, actions and orders); 4512b, § 14 (Tex. Acts 1949, c. 94) (Board of Chiropractic Examiners, licenses); 4573 (Board of Chiropody Examiners, licenses); 4698a, § 11 (Board of Insurance Commissioners, regulation of casualty, fidelity and guaranty insurance); 4750 (same, approval of insurance policy forms); 4775 (same, revocation of certificate to do business); 5221a-5, § 5 (Tex. Acts 1949, c. 234) (Commissioner of Labor Statistics, licensing of labor agencies); 5421c, § 6(j) (Commissioner of General Land Office, action on application for lease or purchase); 6008, § 24 (Railroad Commission, regulation of production of natural gas); 6008a, § 6 (same, sour gas); 6049c, § 8 (same, oil and gas conservation).

⁴⁵ TEX. REV. CIV. STAT. (Vernon, 1948) arts. 118a, § 4 (Commissioner of Agriculture, regulation of packing of citrus fruits); 118b, §§ 6, 8, 14 (same, citrus fruit dealers' licenses); 118c-1, § 8 (same, standardization of tomatoes); 118c-2, § 8 (same, standardization of cabbages); 118d, § 8 (Tex. Acts 1949, c. 93) (Citrus Commission, regulation of citrus fruit industry); 124 (same, abatement of diseased trees and plants); 135a-2, § 4 (same, eradication of Mexican fruit fly); 1287-1, § 6 (same, licensing of dealers in agricultural products); 2686 (county board of school trustees); 2740b, § 10

statutes say that the action of the administrative agency is *prima facie* valid or that a presumption exists in favor of the correctness of the action.⁴⁶ A scattering of statutes expressly allow a jury trial⁴⁷ or deny it.⁴⁸ Appeal is not mentioned in some of the statutes,⁴⁹ and in one it is expressly denied.⁵⁰ Two statutes combine a writ of certiorari with an independent trial in the district court.⁵¹

(county board of education; territorial changes in school districts); 2742c, § 9 (same); 2815f (same); 4429 (commissioners court, removal of county health officer); 4432 (same as to city health officer); 4542a, § 12 (State Board of Pharmacy, licenses); 4573 (Board of Examiners in Optometry, licenses); 4590c, § 9 (Tex. Acts 1949, c. 95) (Board of Examiners in the Basic Sciences, certificates and licenses); 4682b, § 10 (Board of Insurance Commissioners, automobile insurance, classification of risks and rates); 4698a, § 11 (same, casualty, fidelity and guaranty insurance, licenses); 4764b, § 6 (same, form of industrial insurance policies); 4856 (same, revocation of license to do business); 4901 (same, certificate of authority to do business); 4912 (same, classification, rates, policy form); 5062a, § 13 (same, recording agents' and solicitors' licenses); 5421c, § 6(f) (Commissioner of General Land Office, estimate of cost of application for lease or purchase of land); 5702 (Governor or commissioners court, removal of public weigher); 6066a, § 9 (Railroad Commission, rejection of tender or manifest); 6243e, § 18 (Firemen's Pension Commissioner); 6782 (commissioners court, assessment for drainage); 6899-1, § 5 (Department of Public Safety, registration of tattoo marks for animals, protests); 8268 (Board of Commissioners of Pilots, disputes as to pilotage).

⁴⁶ TEX. PEN. CODE (Vernon, 1948) art. 881b, § 8. TEX. REV. CIV. STAT. (Vernon, 1948) arts. 911a, § 17; 911b, § 20; 911d, § 14; 3271a, § 22; 4512b, § 14 (Tex. Acts 1949, c. 94); 4573; 5180; 5221a-4, § 5 (Tex. Acts 1949, c. 234); 6049c, § 8; 6059; 6454; 6783; 6674s, § 11; 7568; 8307, § 5.

⁴⁷ TEX. REV. CIV. STAT. (Vernon, 1948) arts. 4549 (jury may be waived); 6687b, § 31.

⁴⁸ TEX. PEN. CODE (Vernon, 1948) arts. 666-14, 667-6, 667-22. TEX. REV. CIV. STAT. (Vernon, 1948) art. 7880-18.

⁴⁹ TEX. REV. CIV. STAT. (Vernon, 1948) arts. 695c (State Department, Public Welfare Act); 2884 (State Board of Education, cancellation of teacher's certificate); 5221 c (Commissioner of Labor Statistics, repair of steam boilers); 6243-101 (Board of Plumbing Examiners, licenses).

⁵⁰ TEX. REV. CIV. STAT. (Vernon, 1948) arts. 4580 (Board of Embalming and State Board of Health, licenses).

⁵¹ TEX. REV. CIV. STAT. (Vernon, 1948) arts. 46e-11 (Board of Adjustment or zoning board, zoning orders); 1011g (same).

Concerning the latter statute the Texas Supreme Court has said in *Board of Adjustment of City of Fort Worth v. Stovall*, 147 Tex. 366, 369, 216 S. W. 2d 171, 172 (1949):

"However, the review authorized by Art. 1011g, although designated by a different name and involving somewhat different procedure, is not essentially different in nature from the review contemplated by the other statutes we have referred to. . . . [T]he review by certiorari under Art. 1011g is broader than under the common-law certiorari, but the court does not undertake to substitute its discretion for that of the board, and merely determines whether on the whole record the board abused its discretion."

Thus, the substantial evidence rule or a rule similar to it is applicable under the statute.

The likelihood is that the substantial evidence rule will be engrafted upon the bulk of these statutes. Undoubtedly in some instances this will not be true.⁵² It is hard to believe that the independent trial under the Workmen's Compensation Law⁵³ will be changed. And the case of *Lone Star Gas Co. v. State*⁵⁴ still stands as allowing an independent trial of facts and law where a rate is established by the Railroad Commission for a public utility.

4. SUMMARY AND APPRAISAL

The Texas legal climate has not been unusually congenial to administrative agencies. A considerable body of opinion exists that administrative agencies should be subject to close judicial supervision. Hence one may wonder why the Texas Supreme Court adopted the substantial evidence rule when the statutes invited, if they did not direct, a construction allowing independent court trials.

The main explanation probably is stated in the *Gulf-Atlantic* decision. Administrative agencies are established by the Legislature as expert bodies exercising wise discretion in complex fields. Most of the value of the administrative process would be lost if agency determinations were subject to substitution by court judgments on the same evidence. Uniformity of treatment of the subject of regulation is vital, and independent court trials would tend to destroy it.

The Texas Legislature may unwittingly have contributed to the development of the substantial evidence rule. In providing for

⁵² In *State Board of Ins. Commrs. of Texas v. Fulton*, 229 S. W. 2d 652 (Tex. Civ. App. 1950) *er. ref. n.r.e.*, the license of plaintiff insurance agency was suspended for cause for 30 days. TEX. REV. CIV. STAT. (Vernon, 1948) art. 5062b, § 18, provides that appeals to the district court "shall be by a trial de novo, as such term is commonly used and intended in an appeal from justice court to county court." The court of civil appeals declared that this language called for an independent trial of the facts and law and not for application of the substantial evidence rule.

⁵³ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8307, § 5.

⁵⁴ 137 Tex. 279, 153 S. W. 2d 681 (1941), construing TEX. REV. CIV. STAT. (Vernon, 1948) art. 6059 (trial as in "other civil causes"; burden of proof on plaintiff to show "by clear and convincing evidence" that rates are unreasonable, unjust or confiscatory).

trials "de novo" or for actions like "ordinary civil suits" the Legislature seems to have made its intent clear: to afford an independent judicial trial of the issues determined by the administrative agency. But indiscriminate allowance of such trials may well cause the courts to take measures in self-defense to lessen the load of litigation. The oil and gas cases involve such valuable interests that few administrative orders would not be made the subject of petitions for trial de novo. The same may be said, in less degree, with respect to other administrative determinations. One might expect the courts to develop some sort of doctrine which would make a determination reasonably secure where an expert agency has exercised its sound discretion after a fair hearing. The substantial evidence rule undoubtedly operates to cause some litigation to end in the administrative agency because of the small prospect of reversal.

If it is deemed imperative that a court try anew and independently the issues determined by an administrative agency, the remedy for the substantial evidence rule is explicit amendment of the many statutes which presently are susceptible to interpretation bringing the rule into operation. It is to be noted that the Fifty-first Legislature repudiated the substantial evidence rule in two enactments.⁵⁵ The rule was expressly adopted, however, in another statute.⁵⁶

It would seem to be a self-frustrating measure to provide invariably for independent court trials of administrative determinations. Such a measure would relegate the administrative process to an insignificant role in government, out of keeping with its value and

⁵⁵ TEX. REV. CIV. STAT. (Vernon, 1948) arts. 6573a, § 15 (Tex. Acts 1949, c. 149) (Real Estate Commission, licenses); 7880-3c, § F (Tex. Acts 1949, c. 306) (Board of Water Engineers, underground water conservation districts). The former statute declares:

"The case shall be tried in the District Court de novo, upon its merits, and it shall take a preponderance of evidence offered before said District Court for the court to enter a judgment. The substantial evidence rule shall not be used, and the right of trial by jury shall be had in all cases when called for."

⁵⁶ TEX. REV. CIV. STAT. (Vernon, 1948) art. 8197f note (Tex. Acts 1949, c. 110) (Board of Water Engineers, rates for electric energy from the Sabine River Authority).

usefulness. Many more courts would be needed to handle the volume of trial work coming from the administrative agencies.

If administrative determinations are not to be re-tried independently in the courts, what is to be said concerning the Texas substantial evidence rule? A fundamental criticism is that it is cumbersome. A full trial is allowed, all relevant and competent evidence is admitted, but the purpose is a narrow one: to decide whether or not substantial evidence reasonably supports an administrative determination. Would not the same purpose be achieved more efficiently, less expensively and just as fairly by judicial review of the record of the administrative agency and dispensing with the trial? This, of course, is the federal substantial evidence rule, as modified by the Federal Administrative Procedure Act.

Two subsidiary criticisms may be made. The Texas substantial evidence rule does not compel the parties to present all their evidence to the administrative agency; they can hold back and introduce new evidence in the trial court. This situation is obviously undesirable. The parties should be constrained to make available all evidence and arguments which will enable the administrative tribunal to come to a correct conclusion. Also, the rule apparently compels affirmance of an administrative determination where substantial evidence reasonably supports it even though the agency has committed errors in its proceedings.⁵⁷ The trial court may not send the case back for a second exercise of fair judgment on the basis of corrected proceedings. The review is inflexible in that the administrative order must be affirmed or annulled.

An argument may be made that the Texas substantial evidence rule adds a real safeguard without impairing the administrative process. Oral presentation in court may bring out facts and circumstances rendering an agency's order without reasonable support by substantial evidence where this could not be done in an

⁵⁷ *E. g.*, *Southwestern Greyhound Lines v. Railroad Comm.*, 208 S. W. 2d 593 (Tex. Civ. App. 1947) *er. ref. n.r.e.* (order sustained although the Railroad Commission gave an erroneous reason for overruling an objection to the grant of a certificate of convenience and necessity).

appeal on the basis of an impersonal printed record. But it is probably a rare case in which an administrative order could and should be reversed under the Texas rule and in which the same result would not be reached on a simple review of the record aided by briefs and arguments of the parties. If this latter estimate is correct, then the Texas substantial evidence rule must be regarded as a tool for judicial review of administrative orders which is distinctive and is to be preferred, as a matter of policy, over a new, independent trial; but which has no special merit or advantage when compared with the present federal substantial evidence rule.