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ADMINISTRATIVE LAW AND PROCEDURE

TRIAL DE NOVO VERSUS SUBSTANTIAL EVIDENCE RULE

Texas. In *Board of Water Engineers v. Colorado River Municipal Water District*[1] suit was filed by the Colorado River District and the Cities of Big Spring and Odessa against the Board of Water Engineers of Texas and the Martin County Underground Water Conservation District. It is unnecessary to set out the facts at length. For the purposes of this discussion it is adequate to state that the trial in the district court resulted in a judgment that the order of the Board designating a subdivision of Martin County as a water district was invalid because not reasonably supported by substantial evidence and that as a consequence the Martin County District did not have legal existence and all of its rules and regulations were void. The judgment enjoined the Martin County District from enforcing its rules and regulations and from interfering with plaintiffs' activities. From the judgment the Board and the Martin County District perfected a direct appeal to the Supreme Court.

The Supreme Court, in an opinion by Chief Justice Hickman, set the injunction aside and dismissed the case. The statute providing for appeals from orders of the Board of Water Engineers and of underground water districts declares:

> Such suit shall be advanced for trial and be determined as expeditiously as possible, and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the court.[2]

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[1] _____Tex._____, 254 S. W. 2d 369 (1953).

[2] TEX. REV. CIV. STAT. (Vernon, 1950 Supp.) art. 7880-3c, § F.

The court relied on this provision as evidencing an unmistakable intent that suits attacking orders of the Board or underground water districts must be brought within a reasonable time. It was held that plaintiffs could not sue where seven months had passed since the Board created the Martin County District and they had tacitly recognized the District by meeting with its representatives. The court felt that a different decision would violate the legislative intent that there should be no unnecessary delay in obtaining review of the Board's orders.

Defendants were unsuccessful in challenging the jurisdiction of the Supreme Court. Their contention was that the validity of the Board's order could be raised by direct appeal under Rule 499-a of the Texas Rules of Civil Procedure only if the court had enjoined the enforcement of the order. Since the injunction was not against the enforcement of the Board's order but against the enforcement of the rules and regulations of the Martin County District, it was argued that direct appeal to the supreme court did not lie. The court answered that while Subsection (b) of Rule 499-a might be susceptible to a construction favorable to defendants' contention, the court was not bound to look to a court rule to determine its jurisdiction.

The constitutional amendment enlarging the jurisdiction of the court to include cases brought to it by direct appeal reads:

> The Legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this State from an order of any trial court granting or denying an interlocutory or permanent injunction on the grounds of the . . . validity or invalidity of any administrative order issued by any state agency under any statute of this state.[3]

The enabling statute is in the same language as the constitutional amendment and declares that appeals may be taken directly to the supreme court in the cases described.[4] The purpose of the amend-

[3] TEX. CONST. Art. V, § 3-b.
[4] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1738a.

ment was to obtain a quick and final disposition of questions of vital importance by passing over the courts of civil appeals and taking cases by direct appeal to the supreme court. The question of validity or invalidity of an order of a state board or commission was regarded by the legislature as being of sufficient importance to justify this departure from the normal process of appeal. The instant case was held to be of the precise type where a direct appeal was authorized by the constitutional amendment and enabling statute. Rule 499-a was said to be susceptible of a construction consistent with this holding.

Justice Smedley dissented, asserting that the supreme court did not have jurisdiction of the case on direct appeal. He emphasized that the constitutional amendment provided for a direct appeal "on the validity or invalidity of any administrative order issued by any state agency under any statute of this state." His point was that the injunction in this case was not granted on the invalidity of an order of the Board but on the invalidity of the rules and regulations of the Martin County District. He complained that the majority opinion would lead to enlargement of the jurisdiction of the supreme court by direct appeal. One may query whether a distinction of substance was made between an injunction against a Board order and an injunction against rules and regulations of a district created by a void order of the Board.

Another ground upon which defendants based their motion to dismiss was that direct appeal from an order of a state agency is proper only in cases controlled by the substantial evidence rule. The court did not deem it necessary to pass on this contention, but held that the case was governed by the substantial evidence rule.

The statute providing for appeals to the district court from acts and orders of the Board of State Engineers and underground water districts states:

> In all such trials the burden of proof shall be upon the party complaining of such law, rules, regulations or orders or act of the Board, and

> such law, rules, regulations or orders or act of the Board so complained of shall be deemed prima-facie valid but the trial shall be de novo, and the court shall determine independently all issues of fact and law with respect to the validity and reasonableness of the law, rules, regulations or orders or acts of the Board complained of.[5]

The question was whether this statute called into play the substantial evidence rule. The supreme court held that it did. The substantial evidence rule in Texas administrative law, broadly stated, means that in all cases of direct attack upon administrative orders, the trial court is limited to a determination of whether, from all evidence presented before the court, the action of the administrative body is illegal, arbitrary, or capricious, or is not reasonably supported by substantial evidence.[6] In the principal case the majority of the court thought that the statute was

> ... itself a statement of the substantial evidence rule. Under that rule the court makes an independent determination from the evidence adduced at the trial of whether the administrative order is reasonably supported by substantial evidence. The statute provides that the court shall determine the reasonableness of the order. If an order is reasonably supported by substantial evidence it is reasonable; otherwise it is unreasonable.[7]

Justice Smedley, dissenting, thought that the case was not controlled by the substantial evidence rule. He noted that the majority cited the cases of *Fire Department of the City of Ft. Worth v. City of Ft. Worth*[8] and *Jones v. Marsh*.[9] But the statutes in those decisions were different from the one construed in the principal case. The statute involved in the *City of Ft. Worth* case provided that "such cases shall be tried de novo."[10] The statute construed

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[5] TEX. REV. CIV. STAT. (Vernon, 1950 Supp.) art. 7880-3c, §F.

[6] Harris, *A Reappraisal of the Substantial Evidence Rule in Texas Administrative Law*, 3 Southw. L. J. 416, 421, 422 (1949).

[7] 254 S. W. 2d at 372.

[8] 147 Tex. 505, 217 S. W. 2d 664 (1949).

[9] 148 Tex. 362, 224 S. W. 2d 198 (1949).

[10] TEX. REV. CIV. STAT. (Vernon, 1948) art. 1269m, § 18.

in the *Marsh* case said that "the trial shall be de novo under the same rules as ordinary civil suits."[11] On the face of the statutes in the two cases it would appear that an independent trial of the facts and law in the district court was contemplated. Yet the substantial evidence rule was held applicable.

Neither of the statutes in the two cases cited provided, as does the statute in the principal case, that "the trial shall be de novo, and the court shall determine independently all issues of fact and of law with respect to the validity and reasonableness of the . . . orders or acts of the Board complained of." One writer has suggested that the legislature in providing for trials "de novo" or for actions like "ordinary civil suits" has made its intent clear to afford an independent trial of the issues determined by the administrative agency.[12] The cure for the substantial evidence rule, if a cure is desired, is explicit amendment of the many statutes which are susceptible to interpretation bringing the rule into play.[13]

The dissent of Justice Smedley states that the term "de novo" alone advances the thought that there shall be a new trial before the district court. This interpretation is strengthened when the term is coupled with an expression that the court shall determine all issues of fact and law independently.

It appears that the majority opinion gives no effect to the expression that the trial court "shall determine independently all issues of fact and law." The construction of the majority that the language of the statute in this case allows for a limited trial under the substantial evidence rule is a strained one, as it does not seem probable that the legislature intended any such limitation. From the majority opinion it would seem that anything less than an express statement in an appeal statute negativing application of the substantial evidence rule will result in application of the rule.

[11] TEX. PEN. CODE (Vernon, 1948) art. 666-14.

[12] Larson, *The Substantial Evidence Rule — Texas Version*, 5 Southw. L. J. 152, 159 (1951).

[13] *Id.* at 167.

There has been a reluctance on the part of courts generally to meddle with administrative decisions, regardless of the wording of the appeal statutes. The instant decision well illustrates this judicial attitude.

TEMPORARY INJUNCTION—OPERATION OF SUBSTANTIAL EVIDENCE RULE

Texas. In *Transport Co. of Texas v. Robertson Transports*[14] the application of the substantial evidence rule to a suit for temporary injunction against an administrative body was brought into question. Robertson Transports was a specialized motor carrier and held a certificate of public convenience and necessity authorizing it to transport "named chemicals" in trucks between all points in Texas. It filed an application with the Railroad Commission to amend the certificate so as to authorize the transport of "chemicals, liquid chemicals and chemical products" in trucks between all points in Texas. After a hearing the Railroad Commission granted the request.

The Transport Company of Texas and other carriers filed suit seeking temporary and permanent injunctions against the Commission's order and a judgment declaring the order invalid. The trial court granted temporary injunction. The court of civil appeals reversed and dissolved the injunction on the ground that the trial court's judgment did not set forth the reasons for the injunction as required by Rule 683 of the Texas Rules of Civil Procedure. The Texas Supreme Court reversed and reinstated the temporary injunction.

Rule 683 reads in part as follows: "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other doc-

[14] ____Tex.____, 261 S. W. 2d 549 (1953).

ument, the act or acts sought to be restrained. . . ." Rule 683 was adopted from the Federal Rules of Civil Procedure.[15]

The trial court's decree recited the following reasons for the issuance of the temporary injunction: ". . . that if the defendant, Robertson Transports, Inc., proceeds to operate under said order . . . , he would interfere with the markets established by the plaintiffs and would probably divert freight tonnage and revenues from the plaintiffs, that such interference with customers and markets and diversion of freight tonnage and revenues would result in irreparable and inestimable damages to the plaintiffs; that the plaintiffs in said hearing have made a proper showing of a probable right and probable injury of the matters in the temporary injunction prayed for. . . ."

The supreme court stated that while there was little authority on the exact question presented, Rule 683 was mandatory.[16] On application for a temporary injunction the sole question before the trial court is the right of the one seeking the injunction to a preservation of the status quo until a final trial of the case on the merits can be had.[17] To warrant issuance of the writ, the applicant need only show a probable right and a probable injury; he need not establish that it will be he who will generally prevail in the litigation.[18]

The trial court's decree contained an express finding that the petitioners had made "a proper showing of a probable right and a probable injury." The trial court further found that, if Robertson Transport Company were permitted to operate under the Railroad Commission's order, it "would interfere with the markets established by the plaintiffs and . . . that such interference would result in irreparable and inestimable damage to the plaintiffs." The Supreme Court of Texas, reviewing the lower court's findings,

[15] Rule 65(d).
[16] Gonzales v. Rodriques, 250 S. W. 2d 253 (Tex. Civ. App. 1952).
[17] James v. Weinstein & Sons, 12 S. W. 2d 959, 960 (Tex. Comm. App. 1929).
[18] Rosenfield v. Siefert, 270 S. W. 220, 223 (Tex. Civ. App. 1925).

held them to be a sufficient compliance with Rule 683. A federal district court, in a bankruptcy matter, construed Rule 65(d) of the Federal Rules of Civil Procedure, which is substantially identical with Rule 683. The court held that the mere recital that "irreparable damage may result" was a sufficient compliance with the Rule.[19]

Defendants contended that the issue on appeal to the supreme court was governed by the substantial evidence rule. They argued that the judgment granting the temporary injunction should be reversed if the record of the trial court reflected that the Commission's order was supported by substantial evidence. No authority was cited to sustain this contention. The court dismissed this point, asserting that the usual and customary rules governing appeals from temporary injunctions had been applied in reviewing similar decrees restraining the enforcement of administrative orders.[20]

The principal case is important because of the distinction that is made between temporary and permanent injunctions. It is well established that where the question of a permanent injunction is before the reviewing court, the substantial evidence rule is to be applied.[21] The principal case holds that this is not true in the case of a temporary injunction.

Unlike a permanent injunction, which issues after a hearing on the merits, the temporary injunction is preliminary to such hearing and is in no way dependent thereon. A temporary injunction merely preserves the status quo until a final hearing. It seems a little odd that administrative action may be stopped in a suit for temporary injunction where it could not be stopped in a suit for permanent injunction. The burden of the plaintiff in the for-

[19] *In re* Rumsey Mfg. Corp. 9 F. R. D. 93 (W.D.N.Y. 1949).

[20] Railroad Commission v. Shell Oil Co., 146 Tex. 286, 298, 206 S. W. 2d 235, 242, 243 (1947); Southwestern Greyhound Lines v. Railroad Commission, 128 Tex. 560, 572, 573, 99 S. W. 2d 263, 270 (1936).

[21] Larson, *The Substantial Evidence Rule — Texas Version,* 5 Southw. L. J. 152 (1951).

mer suit is easier to meet than in the latter. However, it is to be remembered that the temporary injunction has limited duration. Also, the substantial evidence rule is such that it cannot be applied to less than all the evidence presented at a full hearing. The evidence at the final trial may be different from that presented at the hearing on the temporary injunction.

The court had before it the question whether to apply the language of Rule 683 or to apply the substantial evidence rule. Since the Rule deals specifically with temporary injunctions, it is submitted that the court had no choice but to decide as it did. The express words of the Rule must be regarded as controlling, and one must agree that the time had not yet come for the substantial evidence rule to operate.

TEXAS MOTOR VEHICLE SAFETY-RESPONSIBILITY ACT — CONSTITUTIONALITY

Texas. Gillaspie v. Department of Public Safety[22] was a case in which James D. Gillaspie, a fifteen-year-old minor, was driving an automobile owned by his father when he collided with two other vehicles causing personal injuries and property damage in excess of $100. He had the permission of his father in driving the automobile. Both father and son had driver's licenses. But neither had liability insurance or had deposited any type of security as permitted by the Texas Motor Vehicle Safety-Responsibility Act.[23] The Act provides that an operator of a motor vehicle involved in an accident, regardless of blame, must report it to the Department of Public Safety within ten days if any person is killed or injured or if damage is inflicted to the property of any one person in excess of $100.

After receipt of the report, the Department must determine the

[22] .....Tex....., 259 S. W. 2d 177 (1953).
[23] TEX. REV. CIV. STAT. (Vernon, 1952 Supp.) art. 6701h.

amount of security which is sufficient in its opinion to satisfy any judgment resulting from the accident. Within sixty days after the receipt of the accident report, the Department must suspend (1) the license of the operator of the car and (2) the motor vehicle registration of the owner unless the operator or owner or both deposit security in the sum determined by the Department. The Act further declares that security or suspension is not required if the owner and operator (1) have been released from liability, or (2) have been finally adjudicated not liable, or (3) have executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident. The security and suspension provisions do not apply when the operator or owner of the car has in effect at the time of the accident a liability policy with respect to the motor vehicle involved in the accident.

In the principal case, since neither the operator nor the owner of the car had liability insurance, the Department suspended the automobile registration of the owner of the car and the driver's license of the owner's son. The case was appealed. After hearing evidence, the county court found that the father was not at fault or liable for the injuries and damages. In accordance with this finding it set aside the suspension order as to the owner of the car and affirmed the action of the Department as to the driver. The court of civil appeals reversed the judgment as to the owner of the automobile and upheld the Department's suspension of the automobile registration. The Supreme Court of Texas in a well considered opinion by Justice Smedley affirmed the court of civil appeals in all respects.

The Act has a two-fold purpose: first, to stimulate accident prevention and, second, to provide financial protection to the public against the negligent driving of others.[24] The court observed that the Act does not require one to have liability insurance or other

[24] Townsend, *Motor Vehicle* Act, 14 Tex. B. J. 681 (1951).

security as a condition precedent to obtaining a license or using the highways. Instead, it requires the depositing of adequate security after an accident, in order to protect Texas citizens against financially irresponsible owners or operators of motor vehicles. Many states have similar laws, and they have usually been sustained against various constitutional attacks.[25]

In the case at bar the petitioner contended that the Act, in permitting suspension of license and registration without first determining the question of liability, violated constitutional guaranties of due process and equal protection. The court met this argument by setting forth the well-established principle that the licensing of drivers is a grant of a privilege and not of a right.[26] The privilege is subject to reasonable regulation by the state in the interest of public safety and welfare, and such reasonable regulation may be committed to an administrative body for enforcement. This is especially true when judicial review is provided for, as in this Act. In *Ballow v. Reeves*[27] the Kentucky court stated,

> It seems clear that the legislature may require, as a condition to the right of operating a motor vehicle, the procurement of insurance or the furnishing of other proof of financial responsibility. . . .
>
> "If the legislature may require proof of financial responsibility in advance of the issuance of a license, there seems to be no valid reason why it could not require the same thing of an operator who had been involved in an accident, as the condition upon which he will be peritted to retain his license.

In *Rosenblum v Griffin*[28] the court held constitutional the part of a statute authorizing suspension of a license without a finding of fault or liability. While recognizing that it may be unjust for an operator to lose his license though not at fault, the court felt

[25] Rosenblum v. Griffin, 89 N. H. 314, 197 Atl. 701 (1938).
[26] Taylor v. State, 151 Tex. Crim. Rep. 568, 209 S. W. 2d 191 (1948).
[27] 238 S. W. 2d 141, 142 (Ky. 1951).
[28] 89 N. H. 314, 197 Atl. 701, 704 (1938).

that the statute established "conditions which are definite and conclusive in meeting the need of prompt action."

The petitioner contended that he was denied due process in the Department's fixing the amount of security and ordering suspension of the owner's registration certificate prior to a hearing. The Act does not require a hearing before suspension, although Section 2(a) states that the Department shall provide for hearings upon request of persons aggrieved by its orders or acts. The record did not indicate that the petitioners requested a hearing. Since the driver's license and registration are not property rights but rather privileges, regulation of their issuance or cancellation may be committed to an administrative body or agency.

Ample protection against abuse of administrative authority is assured by Section 2(b) and (c) of the Act, which provides that an order or act of the Department may be appealed to the county court. Thus, the requirements of due process are more than satisfied. The Act further provides that the substantial evidence rule is not to be invoked or to apply, but that the trial shall be de novo without regard to any prior holding of fact or law by the Department.

The petitioners also argued that the Act was invalid because it delegated the Department authority to determine the amount of security required to be deposited without prescribing a sufficient standard. This point was dismissed by the court. It was said that the established rules and principles governing the recovery of judgments for damages are matters of public knowledge and provide a reasonable and sufficient standard for the Department and that ample protection against unreasonable action by the Department in fixing the amount of the security is given by the statutory provisions for appeal and trial de novo.

It would seem clear that the Texas Motor Vehicle Safety-Responsibility Act and other similar statutes are designed to pro-

tect travelers upon the highway, and hence are not violative of any constitutional guaranty.[29] The instant decision is in line with the great weight of authority.

Donald Mopsik.

[29] 6 BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW & PRACTICE (1945) § 3992.