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Boards and Commissions-Appealable Orders

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BOARDS AND COMMISSIONS—APPEALABLE ORDERS.—The Federal Power Commission instituted an investigation of the ownership, management, and control of respondent utility corporations. Respondents were directed to make their books and papers available for examination by the commission's representatives. After a preliminary investigation the commission issued an order setting a date for hearing to gain information on the question of control and organization. In response to respondents' contention that the Commission lacked jurisdiction of the subject matter and of some of the persons, the order was adjourned without day. During proceedings before the Commission to determine its jurisdiction, respondents objected to evidence, alleging that it was not relevant to the issue of jurisdiction but pertained to the subject matter for which the original investigation was instigated. Upon the objections being overruled respondents obtained a decree from the Circuit Court of Appeals¹ directing the Commission that evidence be restricted to the issue of its jurisdiction. On appeal, held, there was no reviewable order before the court; therefore it had no jurisdiction to enter the decree. *Federal Power Commission v. Metropolitan Edison Co.* (1938), 304 U. S. 375, 58 S. Ct. 963.

The statutes concerning independent federal administrative agencies have provided that a person aggrieved by "an order" may appeal to a designated court.² This does not mean that any order regardless of its character may be immediately reviewed by the courts. The functional aspect of the order—whether administrative, legislative, or judicial—is an important factor when judicial review is sought. Where purely ministerial or administrative action of the commission is involved an appeal cannot constitutionally be allowed.³ On the other hand, the doctrine that legislation may not be reviewed by the courts until there is a case or controversy seems to apply to administrative orders. Thus, orders which promulgate general rules and regulations having characteristics of a statute may be reviewed when a particular individual seeks to avoid compliance.⁴

¹ *Metropolitan Edison Co. v. Federal Power Commission* (1938), 94 F. (2d) 943.

² Interstate Commerce Commission, 28 U. S. C. A. sec. 41, subd. 28 "any order;" Federal Power Act, 16 U. S. C. A. sec. 825L; Federal Trade Commission, 15 U. S. C. A. sec. 45 (c); National Labor Relations Board, 29 U. S. C. A. sec. 160 (f) "final order;" Securities and Exchange Commission, 15 U. S. C. A. sec. 78y.

³ "To admit the existence of a direct reviewing power in the courts would violate the constitutional dogma of separation of powers," Dickinson, "Judicial Control of Official Discretion" (1928), 22 *American Political Science Review* 275 at 282.

⁴ See "Appealability of Administrative Orders," 47 *Yale L. Rev.* 766. The argument that a commission's action is strictly legislative would be met by saying that it is invalid as an unlawful delegation of legislative power. The

Even though functions exercised are of a legislative character the question of lawful exercise of the power is a judicial question.⁵ Review is often sought without resort to the statutory appeal. Several complainants have sought to enjoin the proceedings of a commission, alleging that its action is unlawful and burdensome because outside its powers.⁶ These attempts have been unsuccessful because the courts will not use the extraordinary powers of equity where an adequate remedy exists at law. This is found in the statutory provision that the acts required of the parties must be enforced by a court and not the commission.⁷ In a collateral proceeding by the commission to enforce its orders the court must find that they have been lawfully issued and that the commission had power to act.⁸ The question of jurisdiction⁹ is decided and the orders reviewed not as appeals, but because the establishment of a valid order is a necessary prerequisite to enforcement by the court.¹⁰ This distinction is well illustrated in the consolidated cases of *Jones v. Securities and Exchange Commission*.¹¹ In the first case the court dismissed a petition asking that the commission be enjoined from entering and enforcing an order. In the second case, where the commission was seeking the aid of the court to enforce the order, the court adjudged the order invalid and enjoined the commission from taking further action.

Irreparable damage is often alleged to occur from burdens inflicted by an investigation of a commission which is proceeding erroneously. Relief is

power to make general rules and regulations according to statutory authority is generally upheld. *U. S. v. Grimaud* (1911), 220 U. S. 506, 31 S. Ct. 480. It has also been said that prescribing rules for the future is an exercise of administrative jurisdiction and thus not reviewable. *Interstate Commerce Commission v. United States ex rel. Campbell* (1933), 289 U. S. 385, 53 S. Ct. 607. Other cases hold that orders made in an investigation in aid of the legislative function are not reviewable as the statute contemplates review of only those orders entered as an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate-making and rule-making. *United States v. Los Angeles & Salt Lake Ry. Co.* (1927), 273 U. S. 299, 47 S. Ct. 413; *Brady v. Interstate Commerce Commission* (1933), 43 F. (2d) 847, aff. 51 S. Ct. 559. (Query: Is the dictum of these cases contrary to the case or controversy doctrine?)

⁵ *Pacific States Telephone & Telegraph Co. v. Oregon* (1912), 223 U. S. 118, 32 S. Ct. 224; *Federal Radio Commission v. Nelson Brothers Bond and Mortgaging Co.* (1933), 289 U. S. 266, 53 S. Ct. 627.

⁶ *New York O. & W. Ry. Co. v. United States* (1926), 14 F. (2d) 850, aff. 47 S. Ct. 334; *Myers v. Bethlehem Shipbuilding Corp. Ltd.* (1938), 58 S. Ct. 459.

⁷ *Supra*, note 2.

⁸ *Federal Trade Commission v. American Snuff Co.*, (1930) 38 F. (2d) 547.

⁹ *Bradley Lumber Co. v. National Labor Relations Board* (1936), 84 F. (2d) 97; *Chamber of Commerce v. Federal Trade Commission* (1922), 280 F. 45; *MacFadden Publications v. Federal Trade Commission* (1930), 37 F. (2d) 822; *U. S. v. Illinois Central Ry. Co.* (1917), 244 U. S. 82; 37 S. Ct. 584.

¹⁰ *Ellis v. Interstate Commerce Commission* (1915), 237 U. S. 435, 35 S. Ct. 645.

¹¹ *Jones v. Securities and Exchange Commission* (1936), 79 F(2d) 617, certiorari denied in part and allowed in part, 56 S. Ct. 497. Judgment of the Circuit Court of Appeals granting the petition for an order directing Jones to submit to examination reversed, 56 S. Ct. 654.

denied on the ground that such things are part of the social burden of living under government. It is pointed out that a suit in equity would not wholly obviate these burdens.¹²

Where the constitutionality of the statute is in issue there is some possibility of obtaining judicial review before a final order has been issued. Prosecutions have been enjoined where severe penalties for violations of an order of the commission have been imposed by the act and there has been no opportunity to test its validity.¹³ Some cases hold that this is not sufficient reason because ample relief is afforded after a hearing is granted.¹⁴

Where the proceeding is judicial in nature the statutory remedy of appeal must be followed. As already indicated, the courts have interpreted the statutes so as to limit the orders that may be appealed. Thus, an order dismissing a complaint alleging demurrage rules repugnant to the act regulating commerce was held not appealable because negative.¹⁵ This negative order rule was found to be impractical so it was held that an order negative in form was reviewable where it required affirmative action.¹⁶ The limitation on appealable orders now appears to be that only final orders in the nature of a judicial decision are appealable.¹⁷ Thus, protests filed to orders declaring tentative valuation¹⁸ or even final valuation¹⁹ are not reviewable because not final orders. But an order denying confidential treatment to filed information was held to be reviewable. The court said the order affected property rights and was in the nature of a judicial decision.²⁰ To take jurisdiction before a final order has been issued would in effect be drawing the court into

¹² *Supra*, note 9. In the Bradley Lumber Co. case the court said the investigation was very likely to stir up feeling in labor and cause inconvenience, but denied that it had jurisdiction.

¹³ *Stafford v. Wallace* (1922), 258 U. S. 495, 42 S. Ct. 397; *Western Union Telegraph Co. v. Andrews* (1910), 216 U. S. 165, 30 S. Ct. 286. The Federal Power Act 16 U. S. C. A. sec. 825f (c) provides that any person who willfully refuses to comply with the commission's order if he has it in his power to do so shall be guilty of a misdemeanor and on conviction be subject to a fine of one thousand dollars. The Court said, "The qualification that the refusal must be 'willful' fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled." 58 S. Ct. 963 at 968.

¹⁴ *Lawrence v. St. Louis, San Francisco Ry. Co.* (1927), 274 U. S. 588, 47 S. Ct. 720; *Mintz*, "Suits to Enjoin the National Labor Relations Board," 4 *George Wash. L. Rev.* 391.

¹⁵ *Procter and Gamble v. United States* (1912), 225 U. S. 282, 32 S. Ct. 761.

¹⁶ *Alton Ry. Co. v. United States* (1932), 287 U. S. 229, 52 S. Ct. 124, discussed in "Jurisdiction of Court to review orders of Commission Negative in Form;" 1 *George Wash. L. Rev.* 276.

¹⁷ *Chamber of Commerce v. Federal Trade Commission* (1922), 280 F. 45.

¹⁸ *Delaware and Hudson Co. v. United States* (1924), 266 U. S. 438, 45 S. Ct. 153.

¹⁹ *U. S. v. Los Angeles and Salt Lake Ry. Co.* (1927), 273 U. S. 299, 47 S. Ct. 413.

²⁰ *America Sumatra Tobacco Co. v. Securities and Exchange Commission* (1937), 93 F. (2d) 236. This case is adversely criticized in a note, "Judicial Review of SEC decision denying confidential treatment to filed information," 51 *Harvard L. Rev.* 159.

the original proceeding.²¹ Such action would burden the courts and take away the advantages of regulation in specialized fields by independent administrative agencies.²²

The decision in the present case is in accord with the principle discussed above. Whether the order complained of be considered legislative or judicial in character, it is not directly reviewable. The respondents may obtain review indirectly by refusing to furnish information and setting up the alleged unlawful action of the commission as a defense in a suit by the commission to compel the giving of the information asked.

E. O. C.

CRIMINAL LAW—DOUBLE JEOPARDY—DISMISSAL AFTER JURY IMPANELED.—Defendant was indicted by the grand jury, pleaded not guilty, and the cause was submitted to a jury for trial. In his opening statement to the jury, the defense counsel made remarks to the effect that the prosecuting witness, the defendant's daughter, was under arrest and took the witness stand as an unwilling witness. Defense counsel continued to make similar remarks after being reprimanded by the court. As a result of these statements the court discharged the jury. Later, the defendant filed his motion for a discharge from further prosecution and from jail on the grounds that he had been once placed in jeopardy and that the jury had been discharged without legal right and over his objections. This motion was overruled, exceptions were duly saved, and the court's action is assigned as error on appeal. Held, reversed. *Armentrout v. State* (Ind. 1938), 15 N. E. (2d) 363.

It is an established maxim at common law that a man shall not be brought into danger of his life or limb for one and the same offense more than once.¹ This principle has been incorporated into the Constitutions of the United States and of the various states, giving the maxim the added weight of a constitutional guarantee. Where a legal indictment has been returned by a competent grand jury to a court having jurisdiction of the person and the offense, and the defendant has pleaded, and a jury has been duly impaneled and sworn, and all the preliminary requisites of record are ready for the trial, settled law in this state holds that the prisoner has been once put in jeopardy.²

Under the strict practice which formerly prevailed the discharge of the jury for any cause after the proceedings had advanced to such a stage that jeopardy had attached, but before a verdict, was held to sustain a plea of former jeopardy, and therefore to operate practically as a discharge of the prisoner.³ In deference, however, to the necessities of justice, this strict rule has been greatly relaxed, and the general modern rule is that the court may discharge a jury without working an acquittal of the defendant, in any case

²¹ *Meyers v. Bethlehem Shipbuilding Corp. Ltd.* (1938), 58 S. Ct. 459. In answer to appellant's contention that rights guaranteed by the Federal Constitution would be denied unless the court had jurisdiction the Court said, "The contention is at war with the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

²² *Federal Trade Commission v. Claire Furnace Co.* (1927), 274 U. S. 160, 47 S. Ct. 160.

¹ *State v. Elder* (1879), 65 Ind. 282, 32 Am. Rep. 69; *Ex Parte Lange* (1873), 85 U. S. 163, 21 L. ed. 872.

² *Joy v. State* (1860), 14 Ind. 139.

³ *State v. Beal* (1930), 199 N. C. 278, 15 S. E. 604.