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The Illinois Supreme Court and Utility Rates

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NOTES AND COMMENTS

THE ILLINOIS SUPREME COURT AND UTILITY RATES

A Study of the Peoples Gas Case

Important from two aspects is the recent case of *Peoples Gas Light and Coke Company* v. *Slattery*,[1] which sustains the Illinois Commerce Commission in holding the Chicago gas rates down to their present level. Firstly, the court's establishment of independent equity review of administrative rate orders in certain cases is noteworthy; and secondly, much of value exists in the court's pronouncements on rates and valuation, particularly in view of the attitude of the Supreme Court of the United States on the subject. It will be necessary to consider these matters separately.

(1) The Facts of the Case

The present gas rates have been in effect since 1934 through schedule ICC No. 17, which was filed with the Illinois Commerce Commission. An additional 3 per cent tax on its gross receipts[2] caused the Peoples Gas Company to file with the Commission a new schedule (ICC No. 18), proposing a flat increase of 3 per cent to cover the tax. The Commission suspended this schedule for ten months and, after a hearing, entered a final order cancelling it.

The Company then filed ICC No. 19, proposing certain increases in minimum and other rates. On July 1, 1936, the Commission suspended this new schedule until November 24 and set the case for hearing on July 15, which hearing was held. On July 24, the Company petitioned the Commission to install No. 19 as temporary rates until a final order could be entered. The Commission entered an order denying this petition. The Company then filed a complaint in equity in the Circuit Court of Cook County for temporary and permanent injunctions restraining the enforcement, as confiscatory, of the existing rates in ICC No. 17.

The Circuit Court granted a temporary injunction on condition that rates in excess of Schedule No. 19 would not be charged and that the additional money collected be impounded until a final adjudication. The Appellate Court stayed and later vacated the injunction. The Commission extended the suspension of Schedule No. 19 until May 24, 1937.

The case was heard by a Master, before whom, by stipulation, the evidence at that time before the Commission was also introduced. On May 21, 1937, the Commission entered a final order, cancelling No. 19 and finding No. 17 to be reasonable and leaving it in force. In accord with the

[1] 373 Ill. 31 (1940). The Supreme Court of the United States has noted "no substantial federal question." 84 L. Ed. (Adv.) 649 (1940).

[2] While this tax was apparently the moving factor in the request for an increase, the Company, according to its brief, "was convinced that it was entitled to an increase in rates far beyond the moderate increase which had been requested on the basis of the 3% tax act," which attitude eventually resulted in ICC No. 19.

amended complaint, the court then enjoined the enforcement of the order on both schedules, requiring, however, an impounding of funds until a final disposition on appeal. There was a direct appeal to the Supreme Court.

(2) Matters Relating to Procedure and Jurisdiction

There is a provision for statutory appeal from orders of the Commission.[3] Where a hearing is given, a rehearing must first be asked for before court appeal, and, where no hearing is given, a hearing must first be asked before appeal is taken.[4] The temporary suspension of ICC No. 19 was of the type not requiring hearing, and hence should have been followed by a request for a hearing before court action; but the Illinois Supreme Court holds that the Company had complied with the statutory command for a request when it petitioned that the new rates be installed as temporary rates. The court's attempt to justify under the statute seems unnecessary, because, with the appearance of the final order cancelling No. 19, the controversy about the suspension order seems moot in this connection.

The final order was entered after hearing, and, according to the statute, it should have been followed by a request for rehearing and an appeal to the Circuit Court, the act providing that, when no appeal is taken, "parties . . . shall be deemed to have waived the right to have the merits of the said controversy reviewed by a court. . . ."[5] This would appear to be an attempt on the part of the legislature to make the statutory appeal the sole possible remedy, and this interpretation has been indicated by previous Illinois cases, though these are distinguishable.[6]

3 Ill. Rev. Stat. 1939, Ch. 111 2/3, § 72.

4 "Within thirty days after the service of any order or decision of the Commission refusing an application for rehearing . . . or within thirty days after the service of any final order . . . upon and after a rehearing . . . any person or corporation affected . . . may appeal to the circuit or superior court. . . . No proceeding to contest any rule . . . which the Commission is authorized to issue without a hearing and has so issued shall be brought in any court unless application shall have been first made to the Commission for a hearing thereon and until after such application has been acted upon by the Commission. . . ." Ill. Rev. Stat. 1939, Ch. 111 2/3, § 72.

5 Ibid.

6 "Appellees contend that the order is unreasonable and that the commission should therefore be enjoined from enforcing it. The question of the reasonableness of the order cannot be determined in this proceeding. The Public Utilities Act provides for a hearing before the commission upon that question, at which the person or corporation complained of is entitled to be heard and to introduce evidence, and if such person or corporation desires to contest the reasonableness of the order made by the commission after such hearing, he or it is by the act allowed an appeal to the circuit court of Sangamon County and a further appeal to this court. The statutory method of reviewing the reasonableness of orders of the commission is exclusive." City of Chicago v. O'Connell, 278 Ill. 591 at 607, 116 N.E. 221 (1917), in which, however, the court went into the question of whether the rate orders were void (as contrasted with unreasonable) because of certain contracts with the municipality. Again, in Chicago North Shore & Milwaukee Railroad Co. v. City of Chicago, 331 Ill. 360, 163 N.E. 141

Whether such an interpretation, barring an independent suit in equity, would be valid as constitutional depends upon the adequacy of the remedy provided. The statute plays a role similar to that of the rule adopted by judicial decision in *Prentis* v. *Atlantic Coast Line*[7] by the United States Supreme Court, to the effect that all administrative remedies must be exhausted before recourse to the courts. It was later declared, however, that this is merely a rule of convenience and must give way to constitutional right, as where it is charged that a rate now in effect is daily confiscating property without due process of law and there is no provision for suspension of the rate during the administrative procedure.[8]

The act must also pass a test of validity upon a state constitutional ground. The Illinois Constitution, vesting the circuit courts with original jurisdiction in equity,[9] is construed to prohibit the legislature from de-

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(1928), the court went into the question of whether certain contracts were binding on the state, and, when the city attempted to attack a grant of tracks on the question of public convenience and necessity, replied that the remedy by appeal was exclusive as to this. The question whether the order was void because of binding contracts was again treated in Hoyne v. Chicago & Oak Park Elevated Railroad Co., 294 Ill. 413, 128 N.E. 587 (1920), and the complaint requesting an injunction was dismissed, not for lack of jurisdiction, but simply because binding contracts were not shown. In Illinois Bell Telephone Co. v. Illinois Commerce Commission, 206 Ill. 109 at 112, 137 N.E. 449 (1922), it was held that where the Commission has failed to find what would be a reasonable rate, the remedy is not by bill in equity to enjoin the Commission from interfering with the rate set by the company, but by mandamus to order the Commission to find the reasonable rate. The court went on, "The statute gives the public utility the right to apply for a rehearing, and upon a denial of what it conceives to be its right an appeal to the circuit court. If the commission makes no finding whether the proposed rates are just and reasonable and fails or refuses to establish rates, the remedy by *mandamus* is clear, certain and adequate to compel the performance of the duty imposed by the law. In either event there is no ground for interference by a court of equity *where no other ground of equity jurisdiction exists.*" Italics are the author's. This last statement would appear to explain all of the above cases. In none of them was there any reason why the appeal was not an adequate remedy at law, since there were no questions raised, other than the contract questions of which the court actually did take jurisiction, which might involve the constitutionality of matters essentially temporary and requiring rapid action.

In Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300, 58 S. Ct. 199, 82 L. Ed. 276 (1937), the United States Court affirmed the denial of our courts of an injunction on the ground that the remedy by appeal was adequate. However, this was not a rate case, merely being an order that certain information be filed, which order the Company should have asked the Commission to suspend. Hence there was no day-by-day confiscation that required immediate court action. One justice in the instant case concurs specially on the ground that this case shows the statutory remedy to be exclusive.

7 211 U.S. 210, 29 S. Ct. 67, 53 L. Ed. 150 (1908). See notes, 18 CHICAGO-KENT LAW REVIEW 74 at 81; 27 Col. L. Rev. 450; 35 Col. L. Rev. 230.

8 Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659 (1923); Pacific Telephone & Telegraph Co. v. Kuykendall, 265 U. S. 196, 44 S. Ct. 553, 68 L. Ed. 975 (1924). See also Prendergast v. New York Telephone Co., 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923); United States v. Illinois C. R. Co., 291 U. S. 457, 54 S. Ct. 471, 78 L. Ed. 909 (1934).

9 Ill. Const. 1870, Art. 6, § 12.

priving those courts of any of their equity jurisdiction unless an equally sufficient remedy in the courts is provided to the person injured.[10] There is no doubt that, before the statute, the Circuit Courts did have jurisdiction to enjoin confiscatory rates.[11] Hence, to run the gamut of both state and federal Constitutions, the statute must provide a review which will operate without allowing unlawful rates to confiscate the property of the Company during the time that the review is pending.

The Supreme Court holds that the statute fails to meet this test, its ground being that "it is not reasonable to suppose that any action on appeal to the circuit court would bring any relief pending hearing of the main cause, either from disinclination of the commission to act, or from the time it would necessarily take to prepare a record and get the cause heard in the circuit court."[12] This time lost would appear to be irrelevant if, during this time, the new rates could be put in force. This can be done easily, and was done here, in an independent equity suit by means of a temporary injunction restraining the enforcement of any rate below the new one as confiscatory.

Whether the statutory appeal can afford such temporary relief is more difficult. Where the appeal is brought to set aside an order of the Commission *setting a new rate,* the court in its discretion may suspend the order,[13] which seems a near enough equivalent to the temporary injunction. However, before the appeal is allowed, there must be a petition for rehearing, which the Commission has twenty days to answer,[14] and a goodly sum can be lost through insufficient rates for twenty days. Thus it would seem that the statutory appeal is an insufficient remedy even as to such an order.

Furthermore, this suit asks, not merely that the court quash a new rate set by the Commission, but that the court set aside an existing rate—that in Schedule 17—and itself install a new rate—that in Schedule 19—during the hearing of the case. This would be impossible in a statutory appeal for two reasons; (1) the act expressly bars a suspension of rates where they have been in effect more than a year,[15] and those in Schedule No. 17 have been in effect for such a period; and (2) it has been held that it

[10] See Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31 at 42 (1940); Stephens v. Chicago, B. & Q. R. R. Co., 303 Ill. 49, 135 N.E. 68 (1922); Howell v. Moores, 127 Ill. 67, 19 N.E. 863 (1899).

[11] City of Chicago v. Rogers Park Water Co., 214 Ill. 212, 73 N.E. 375 (1905).

[12] Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31 at 45 (1940).

[13] Ill. Rev. Stat. 1939, Ch. 111 2/3, § 75: ". . . during the pendency of such appeal the circuit or superior court, or the Supreme Court, as the case may be, in its discretion may stay or suspend, in whole or in part, the operation of the Commission's rule, regulation, order or decision."

[14] Ill. Rev. Stat. 1939, Ch. 111 2/3, § 71.

[15] "When any rate or other charge has been in force for any length of time exceeding one year, and such rate or other charge is advanced by the public utility and the order of the Commission reinstates such prior rate or other charge, in whole or in part, no suspending order shall be allowed in any case from such order pending the final determination of the case in the circuit or superior court, or if appealed to the Supreme Court by such Supreme Court." Ill. Rev. Stat. 1939, Ch. 111 2/3, § 75.

is not the function of the Circuit Court on appeal to set rates,[16] and this is undoubtedly just as applicable to temporary rates as it is to permanent ones. Hence Illinois now may be stated clearly to permit the injunctive remedy at least in attempts to set aside already existing rates; and the statement of the court is broad enough also to permit independent equity relief against new rate orders, which seems justifiable in view of the reasons advanced above.

This broader interpretation is consistent with what the Supreme Court then did in relation to the statute which provides that failure to prosecute the statutory appeal deprives one of the right to judicial review.[17] Although the court did not declare the statute unconstitutional, it gave the act a constitutional interpretation which rendered it absolutely inoperative and useless; in effect the court twists the statute into stating that failure to prosecute the statutory appeal bars the right of statutory appeal.[18]

(3) The Issue of Confiscation Under the Due Process Clauses of the State and Federal Constitutions

The court held that the real issue in this case was whether the existing schedule No. 17 was unconstitutional and not whether No. 19 was reasonable, since the judicial function would allow only enjoining but not fixing rates.

In deciding the fair valuation on which the rate should be calculated, the court considered first land and then other property. Original cost of all land used and useful was agreed to be $4,556,121. But as to present cost, the testimony of the Company's witnesses differed with the conclusion of the Commission's witnesses about five millions. The Commission's finding of the net present value of useful lands was $4,732,822, whereas the master and chancellor found it to be almost eight millions. The Supreme Court, on the other hand, sustained the Commission's finding because it could not say that the finding was unreasonably low.[19]

[16] Illinois Commerce Commission ex rel. Lumaghi Coal Co. v. Chicago & E. I. Ry. Co., 332 Ill. 243, 163 N.E. 664 (1928); Henderson County v. Chicago, B. & Q. R. Co., 320 Ill. 608, 151 N.E. 542 (1926); Alton & S. R. Co. v. Illinois Commerce Commission, 316 Ill. 625, 147 N.E. 417 (1925); Peoples Gas Light & Coke Co. v. City of Chicago, 309 Ill. 40, 139 N.E. 867 (1923).

[17] Ill. Rev. Stat. 1939, Ch. 111 2/3, § 72.

[18] "This provision must be construed to apply to the procedure of reviewing the acts of the commission by the statutory appeal provided, as otherwise it would absolutely bar any relief in courts of equity and thus oust them from their constitutional powers in cases where the statute does not provide for adequate relief, and likewise would be a denial of the right of judicial review in cases where the acts or omission of the commission violate constitutional guarantees." Peoples Gas Light & Coke Co. v. Slattery, 373 Ill. 31 at 47 (1940).

[19] "There is nothing definite and certain about the value of these several tracts of real estate, other than the original cost. In the very nature of things it is more or less a speculation depending upon which expert is believed. We cannot say the value fixed by the Commission was shown to be unreasonably low." 373 Ill. 31 at 50.

As to other property, the original cost established was $111,330,067.67, no opposing proof being offered by the Commission. However, a two-million dollar item which had previously been charged to expense was included in this, and this the Court rejected as improper.[20] This seems sound. Once the customers have furnished the money to buy an item, it should not be used to raise the capital in order to create higher prices.

The Court, however, noted that the discrepancies in valuation figures between those of the Commission and those of the Court and Master were so "startling as to require an examination into methods used to arrive at the different results."

The Company's witnesses arrived at a valuation of all property used and useful of $165,682,411. This figure was reached by adding to the values of land as before mentioned $156,709,359 reproduction cost new (first depreciated approximately 17%) and $15,000,000 for going value and $10,334,085 for working capital.

The Commission arrived at a valuation of property used and useful of $120,000,000. This figure was based, according to the Supreme Court, upon consideration of $127,869,677 reproduction cost new (which was then depreciated 22%), the value of real estate as before stated, $7,500,000 for working capital, and $7,200,000 for intangibles. The Court states that the Commission did not base its conclusion entirely upon original cost or entirely upon reproduction cost new, but upon a combination of all the factors required in the so-called rule in *Smyth* v. *Ames*.[21]

The Chancellor and Master arrived at a valuation of $147,497,418. This was on the basis of straight reproduction cost. (The fact that this was strictly reproduction cost was attempted to be traversed by the fact that a witness took a so-called "original cost trended to present prices," meaning what the various assets would cost in present-day dollars. However, the estimate varied only $300,000 from a straight reproduction estimate and the witness himself referred to it as an appraisal of reproduction cost.) A reproduction cost new of $150,467,084 was depreciated 15% and added to the value of the land, $8,250,000 for working capital, and $7,200,000 for going value. This the Supreme Court rejected, as not considering all the factors involved in the rule of *Smyth* v. *Ames*.

However, the Court pointed out that, merely because the method employed by the lower court was erroneous, the Commission was not necessarily right. It then went on to sustain the Commission's findings. Seemingly everyone in the case, Court, Commission, and Company, calculated on the basis of reproduction cost, their only argument being as to what the reproduction cost was. The Commission's valuation, however, was saved

[20] "It seems clear that it is not proper to build up operating expenses and get the advantage of a rate authorized to cover them, and later change the method of accounting to include such excess items as part of the investment of the company, when, in reality, the money has been furnished by the customers of the company." 373 Ill. 31 at 52.

[21] 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898). The factors involved in the rule are stated in the text, infra, above footnote 25.

by the fact that it purported to consider the various irreconcilable factors set down in *Smyth* v. *Ames,* among them both original and reproduction cost; and since the figure arrived at exceeded the original cost, this constitutional requisite was satisfied.

Since the amount of the rate base is one of the factors which determines whether either of the due process clauses of the Federal Constitution[22] have been violated, the decisions of the Supreme Court of the United States are necessarily final on that subject.[23] That court has been controlled by such a theory that a rate base which is below what it should be is of necessity unconstitutional, apparently because the public's taking of the use of the property at too low a rate is just as much taking property for public use without compensation as is condemning property at too low a price in eminent domain proceedings.[24] In attempting to find the valuation on which the rate should be calculated, the court met with difficulty at the outset because of the fact that the price at which property should be condemned is the fair market value, which, according to economic theory, is the price at which a normal demand will purchase it—which in turn, because of the natural desire of competing capital to seek profitable channels of investment, is the capitalization of the earnings at a fair rate of return.[25] If the Supreme Court is to allow any regulation of rates at all, it has, if it be consistent with its own theory, already allowed "confiscation." Instead of destroying the eminent domain analogy when confronted by this impasse, the Supreme Court created an artificial fair value, which was to be determined by "consideration" of such factors as original cost, the amount expended in permanent improvements, amount and market value of bonds and stock, the present as compared with the original cost of construction, the probable earning capacity under the contemplated rates, and the sum required to meet operating expenses.[26]

The term "consideration" has caused no little difficulty. Apparently it should merely mean that the above factors should be thought over to see if they have any relation to the rates that should exist, since the factors themselves are as impossible to add together as are oranges and apples. However, for a time the Court—in the O'Fallon case—[27] singled out the two factors of original and reproduction cost and held that "consideration" meant that both of them must be given weight "in the legal sense"—which meant that a Commission could not think them over and then reject one as unreliable; it must add some portion of the differential to the smaller amount, though the Court spurns any "formula" which will tell

22 U. S. Const., Amendments 5 and 14.

23 Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894).

24 See R. L. Hale, "Conflicting Judicial Criteria of Utility Rates—the Need for a Judicial Restatement," 38 Col. L. Rev. 959; Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1877).

25 Ibid.; Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, 6 S. Ct. 334, 29 L. Ed. 636 (1886).

26 Smyth v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. Ed. 819 (1898).

27 St. Louis & O'Fallon Ry. Co. v. United States, 279 U. S. 461, 49 S. Ct. 384, 73 L. Ed. 798 (1929).

the Commission how much to add. Perhaps this attitude has changed; in a recent case[28] the Commission was allowed to disregard, as unreliable, evidence of a higher reproduction cost because the plant had been purchased in a higher price period, so that the original cost should clearly have been the highest and a higher reproduction cost was obviously erroneous. Now and then an opinion has emphasized reproduction cost,[29] particularly if there has been a definite change in price levels.[30] Occasionally as part of this cost, a going value which includes earning power has been sanctioned,[31] but this would seem to depend upon the capitalized rates and would absolutely destroy any ability to lower them, just as would a strict eminent domain analogy. In two recent cases[32] the Court has refused to believe the evidence of higher reproduction cost because the stockholders were getting big returns at the existing rates which the company alleged to be confiscatory. In these two cases, the Court seems, by considering what the stockholders get, to be deciding the case on the basis of original investment, although perhaps it would not be realized in a case where the contrast between returns and allegations was of a less shocking degree.

The principles laid down by the Supreme Court of the United States being still nebulous, the attitude of our state Supreme Court may be of importance in determining valuations. In *Public Utilities Commission* v. *Springfield Gas and Electric Company*,[33] the Illinois Court reversed the Commission's rate order because, though the order stated differently, the Commission appeared to have considered only original cost, and because the Commission refused to include going value. The Court then observed, "It would be equally as unfair to the consumer to fix the rate at a figure which would produce a reasonable income on a value determined by the cost of reproduction new at a time when cost of construction is abnormally inflated, as it would be unfair to the public utility to compel it to serve the public for a rate that would produce a reasonable income on a value determined by cost of reproduction new at a time when the cost of construction was abnormally low. Therefore it cannot be laid down as a rule without qualifications that cost of reproduction new, less depreciation, is the only basis of valuation for rate-making purposes. It is equally true that the original cost of construction, less depreciation, cannot be held to be the only proper basis for determination of valuation for rate-making purposes. . . . Each case must be considered on its own merits

[28] Railroad Commission of the State of Cal. v. Pacific Gas & Electric Co., 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319 (1938).

[29] State ex rel. Southwestern Bell Tel. Co. v. Public Service Commission of Missouri, 262 U. S. 276, 43 S. Ct. 544, 67 L. Ed. 981 (1923).

[30] McCardle v. Indianapolis Water Co., 272 U. S. 400, 47 S. Ct. 144, 71 L. Ed. 316 (1926).

[31] Ibid.

[32] Lindheimer v. Illinois Bell Telephone Co., 292 U. S. 151, 54 S. Ct. 658, 78 L. Ed. 1182 (1934); Dayton P. & L. Co. v. Public Utilities Commission, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267 (1934).

[33] 291 Ill. 209, 125 N. E. 891 (1920). See also Ill. Commerce Commission v. C. & E. I. Ry Co., 332 Ill. 243. 163 N. E. 664 (1928).

and such result of value arrived at as may be just and right in each case."[34] This would indicate that our Court leans toward the theory that the "consideration" mentioned in *Smyth* v. *Ames* merely requires thinking over the factors, not "weight in the legal sense." However, in the instant case, the final valuation arrived at was higher than the original cost, so that under either theory the decision can be supported.

After the allowable expense,[35] including depreciation, was deducted from gross income, a net return of five per cent remained on the rate base as set above. The Court held that such a return was not confiscatory, in view of the fact that in 1936 the highest grade utility bonds yielded only up to 3½ per cent, that between 1934 and 1936 first class utilities could borrow on bonds at a maximum of 4½ per cent and that average yield on best bonds of railroads and industries during 1936 and 1937 ranged up to 4½ per cent. This company had borrowed several millions at 4 per cent. Holding that the rate of return is to be tested by present-day conditions, the Court decided that 5 per cent was not confiscatory.

However, bond interest rates should not be taken as governing. A utility is entitled to a rate of return equivalent to that in other businesses of similar risks; a return reasonably sufficient to attract investment.[36] There must be stockholders as well as bondholders; since the bondholders have a lien on the assets, the stockholders should get a higher rate of return.

(4) The Extent of Judicial Review of Administrative Rate Orders

Apparently the holdings of *Ohio Valley Water Company* v. *Ben Avon Borough*[37] and *St. Joseph Stockyards* v. *United States*,[38] to the effect that where in a rate case a confiscation question arises, the Court must arrive at a conclusion as to the issue of confiscation on its own independent judgment as to both the law and the facts, since it is reviewing the legislative act of a quasi-legislative tribunal, are still law. The latter case, it is true, states that there is a strong presumption favoring constitutionality after a hearing by an administrative body.[39]

[34] Public Utilities Com. v. Springfield Gas & Electric Co., 291 Ill. 209 at 222, 125 N. E. 891 (1920).

[35] The Company sold many gas appliances on a trade-in agreement to win new customers. The Commission disallowed this item as an expense. "Since gas appliances are sold by many other dealers and those sales made by the gas company, if conducted as a separate business, would not be subject to regulation as a utility, the advisability of such a method of promoting sales of gas and of the propriety of the amount thus expended becomes a matter entirely for the commission." 373 Ill. 31 at 65. But does it? Has the Commission a right to substitute its theories of business management for those of the Company?

[36] United R. & Electric Co. v. West, 280 U. S. 234, 50 S. Ct. 123, 74 L. Ed. 390 (1930).

[37] 253 U. S. 287, 40 S. Ct. 527, 64 L. Ed. 908 (1920).

[38] 298 U. S. 38, 56 S. Ct. 720, 80 L. Ed. 1033 (1936).

[39] "But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the

Some of the language used in the instant case renders doubtful whether our court complied with the rule set down by these cases. In discussing the value of the land, the Illinois Court dismisses the Chancellor's valuation because based on conflicting expert testimony and observes, "We cannot say the value fixed by the commission was shown to be unreasonably low."[40] In sustaining the Commission's valuation of other property, the Court states, "The record is replete with testimony of percentages of depreciation, obsolescence, replacement and maintenance, *which it was the province of the commission to consider and analyze.*"[41] Depreciation cost is dismissed with the observation that the "commission is presumed to be an expert body itself, and the fixing of the amount allowable for annual depreciation was *entirely within its province,* which we are not at liberty to disturb unless we find its action arbitrary or unreasonable."[42]

All of this indicates a desire to effectuate the "strong presumption" of validity which was mentioned in the St. Joseph Stockyards case. However, it would seem that this presumption, like all other presumptions, is for the *trial court* to consider when hearing the evidence. The Supreme Court, in thus giving the Commission a reasonable range of discretion rather than giving it to the trial court as is done in usual cases, has placed the Commission in the position of the Chancellor, its decision absolutely final if supported by substantial evidence, which is exactly what is forbidden by the Ben Avon case. This is almost exactly what the Pennsylvania Supreme Court was reversed for doing in the first Ben Avon case,[43] when it considered only whether the Commission's order had any substantial evidence to support it. After the reversal of this case, the controversy again came back to the Pennsylvania Supreme Court and that court held that "now, better advised, we give that effect to the findings of the latter [the trial court], because it is the 'judicial tribunal' whose 'independent judgment' is required. . . ."[44] The same discretion has been given the trial court in such proceedings by other state courts.[45] It is because of this that Mr. Justice Stone dissents.

Such a procedure is perhaps sustainable upon the theory that, be-

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assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that 'in a question of rate-making there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.' " At 298 U. S. 53, 56 S. Ct. 720, 80 L. Ed. 1033 at 1042.

40 373 Ill. 31 at 51.

41 373 Ill. 31 at 56. Italics are the author's.

42 373 Ill. 31 at 60.

43 Borough of Ben Avon v. Ohio Valley Water Co., 260 Pa. 289, 103 A. 744 (1918).

44 Ben Avon Borough v. Ohio Valley Water Co., 271 Pa. 346, 114 A. 369 at 372 (1921).

45 See Wichita Gas Co. v. Public Service Com., 126 Kan. 220, 268 P. 111 (1928).

cause of the dignity and importance of the Commission and its findings, the Supreme Court has itself become a trial court, considering the evidence and giving effect to the presumption of validity. There is a United States Supreme Court case which expresses the attitude that such should be the procedure.[46] It is submitted, however, that such action efficiently undermines the independent judicial review of the Ben Avon case. Perhaps this is desirable; the case has been the subject of fiery discussion.[47] And perhaps the Supreme Court of the United States, in denying appeal[48] despite the language in the instant case, is launching upon an attitude that shows a much less tender regard for the doctrine of independent judicial review.

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[46] "The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. . . . The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical question, sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well-settled these rules may be in ordinary litigation." Knoxville v. Knoxville Water Co., 212 U. S. 1 at 8, 29 S. Ct. 148, 53 L. Ed. 371 at 378 (1909).

[47] See Brown, "The Functions of Courts and Commissions in Public Utility Rate Regulation," 38 Harv. L. Rev. 141; Merrill, "Does 'Legislative Review' by Courts in Appeals from Public Utility Commissions Constitute Due Process of Law?" 1 Ind. L. J. 247.

[48] 84 L. Ed. (Adv.) 649 (1940).