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Administrative Law: Judicial Review of Determinations of Corporation and Insurance Commissioners and Other State-Wide Administrative Tribunals

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Comment

ADMINISTRATIVE LAW: JUDICIAL REVIEW OF DETER- MINATIONS OF CORPORATION AND INSURANCE COMMISSIONERS AND OTHER STATE-WIDE ADMINISTRATIVE TRIBUNALS.

LICENSE REVOCATION

In 1936 the California supreme court handed down the first of a series of decisions which have radically altered the scope of judicial review of the determinations of state-wide administrative tribunals. During the past five years the court has been sharply divided on the propriety of the doctrines evolved, and there have been recent hints that it may be ready to resume the position advocated by the minority

of the court and by all of the many law review articles¹ which have dealt with this topic.

The foundation case of the present doctrine is *Standard Oil v. State Bd. of Equalization*² where it was held that certiorari was not the appropriate writ for the determinations of state-wide administrative tribunals, inasmuch as the latter could not be invested with "judicial" power.³ The next big step occurred in 1939,⁴ when the supreme court held in *Drummey v. State Bd. of Funeral Directors*⁵ that a licensee whose license had been revoked after hearing before an administrative tribunal had a "constitutional" right to have a court reweigh the evidence appearing in the record of the administrative proceeding and make independent findings of fact therefrom. In the *Drummey* case the court also decided that mandamus was the proper writ for judicial review of administrative adjudication.⁶

The next inroad by the judiciary occurred in another license-revocation case, *Laisne v. Cal. St. Bd. of Optometry*,⁷ where it was held that the licensee was entitled to trial *de novo* in the reviewing court.⁸

¹ Elliott, *Certiorari and the Local Board* (1941) 29 CALIF. L. REV. 586; McGovney, *Administrative Decisions and Court Review Thereof, in California* (1941) 29 *ibid.* 110; McGovney, *Court Review of Administrative Decisions in California: The Pending State Constitutional Amendment* (1942) 30 *ibid.* 507; McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies* (1942) 15 SO. CALIF. L. REV. 391; Rode, *Administrative Adjudication in California and Its Review by the Writ of Certiorari* (1937) 25 CALIF. L. REV. 694; Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California* (1941) 29 *ibid.* 275; Turrentine, *The Laisne Case—A Strange Chapter in Our Jurisprudence* (1942) 17 CAL. ST. BAR J. 165; (1939) 27 CALIF. L. REV. 738; (1943) 31 *ibid.* 436; (1940) 13 SO. CALIF. L. REV. 500. See also GELLHORN, *ADMINISTRATIVE LAW—CASES AND COMMENTS* (1940) 819, n.

² (1936) 6 Cal. (2d) 557, 59 P. (2d) 119.

³ Time out of mind, adjudication has been a function of administrative agencies, as well as of courts, subject only to a limited review by courts. The Supreme Court of the United States holds that the "reservation of full authority to the [reviewing] court to deal with matters of law provides for the appropriate exercise of the judicial function [in reviewing administrative decisions]." *Crowell v. Benson* (1932) 285 U. S. 22, 54.

⁴ In 1937 the supreme court decided as a corollary to the *Standard Oil* case that the writ of prohibition could not run to state-wide administrative tribunals. *Whitten v. California State Board* (1937) 8 Cal. (2d) 444, 65 P. (2d) 1296, 115 A. L. R. 1.

⁵ (1939) 13 Cal. (2d) 75, 87 P. (2d) 848.

⁶ In a *per curiam* opinion handed down four months after the *Drummey* case, the court admitted that "the holding therein authorized an extension of the traditional functions of a proceeding in *mandamus* in the superior court." *McDonough v. Goodcell* (1939) 13 Cal. (2d) 741, 752, 91 P. (2d) 1035, 1041, 123 A. L. R. 1205, 1214. The really radical nature of this extension was detailed by the court in *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal. (2d) 321, 328, 109 P. (2d) 935, 940.

⁷ (1942) 19 Cal. (2d) 831, 123 P. (2d) 457.

⁸ The court in the *Laisne* case also iterated the distinction drawn in the *Standard Oil* and *Drummey* cases between state-wide and local administrative tribunals in stating that the latter could constitutionally be invested with "judicial" power [*ibid.* at 847, 123 P. (2d) at 466]. Therefore, whether certiorari or mandamus is used as a review writ, the scope of review is limited to "abuse of discretion". This rule still obtains; see *McDonough v. Garrison* (1945) 68 Cal. App. (2d) 318, 333, 156 P. (2d) 983, 991. Nor is the

The *Laisne* case was decided by a sharply divided court, over the scholarly and penetrating dissent of Chief Justice Gibson.⁹ The latter not only demonstrated the logical absurdities of the majority opinion but previewed the really serious handicaps this doctrine would impose upon administrative enforcement of regulatory statutes. As could be expected, the *Laisne* case prompted redoubled criticism from commentators¹⁰ and gave even greater impetus to the movement to amend the California constitution to permit the legislature to establish the "substantial evidence" rule in court review of administrative determinations.¹¹

One of the practical consequences of the *Laisne* case soon confronted the court: attempts were made by licensees to save their cases for "trial *de novo*" in the reviewing court by making only a skeleton presentation in the administrative hearings. If successful, this maneuver would have imposed a tremendous burden on those tribunals with "judicial" power. Realizing this, the supreme court in *Dare v. Bd. of Medical Examiners*¹² beat a considerable (if not logically impeccable) retreat from the full "*de novo*" *Laisne* doctrine. The revamped theory required that the petitioner must have participated in good faith before the board (else "that fact should weigh heavily against him"), and that the litigant could only introduce as new matter evidence improperly excluded by the agency, new evidence which had not been obtainable through exercise of reasonable diligence at the time of the administrative hearing, and evidence to contradict or impeach testimony of witnesses whose credibility is assailed on judicial review.¹³ The court also held that one petitioning for a writ of mandamus is not entitled to the writ "as a matter of right", but that the trial court might deny issuance in its "wisely exercised" discretion.¹⁴

trial *de novo* doctrine applicable to administrative adjudication by the Industrial Accident Commission and the Railroad Commission, as these agencies are invested with adjudicative power by the California constitution (art. XX, § 21; art. XII, § 22); this is recognized by the majority in the *Laisne* case, *supra* note 7, at 837, 123 P. (2d) at 461. The recent case of *Covert v. State Board of Equalization* (1946) 29 A. C. 121, 173 P. (2d) 545 puts liquor license adjudications of the State Board of Equalization within this rule.

⁹ 19 Cal. (2d) at 848, 123 P. (2d) at 467, Edmonds and Traynor, JJ., concurring.

¹⁰ McGovney, *Court Review of Administrative Decisions*; McGovney, *The California Chaos in Court Review*; Turrentine, *The Laisne Case*, all *loc. cit. supra* note 1.

¹¹ The amendment (Cal. Stats. 1941, p. 3549) was defeated in the 1942 general election. Arguments for the amendment are detailed in the articles cited *supra* note 10; arguments against in Bianchi, *The Case Against S. C. A. Number 8* (1942) 17 CAL. ST. BAR J. 172; Browne, *Proposition 16 Should Be Defeated* (1942) *ibid.* 184; *Reasons Why the State Bar of California Is Opposed to Proposition No. 16* (1942) *ibid.* 257.

¹² (1943) 21 Cal. (2d) 790, 136 P. (2d) 304, 31 CALIF. L. REV. 436.

¹³ 21 Cal. (2d) at 799, 136 P. (2d) at 309.

¹⁴ *Ibid.* at 796, 136 P. (2d) at 308. The *Dare* case further decided that the record of the administrative proceedings should be produced in evidence at the mandamus hearing [*ibid.* at 798, 136 P. (2d) at 308]. This requirement was held not to be mandatory in

However, the three judges who dissented in the *Laisne* case would not accept the majority's "retracing of the way back from the concept of a trial de novo that never materialized"; the concurring and dissenting minority opinion rejected this new concept of mandamus review which looked something like certiorari, and again demonstrated that certiorari and the substantial evidence rule were both desirable and in accord with the overwhelming weight of authority in this country.¹⁵

The next case to consider the proper scope of judicial review of administrative adjudication was *Sipper v. Urban*,¹⁶ decided a month after the *Dare* case. Sipper was a real estate broker whose license had been suspended after hearing before the real estate commissioner. On mandamus, the trial court did not take additional evidence nor conduct a "trial de novo"; instead, after reading the petition and transcript, it entered a minute order denying mandamus on the ground that the record contained "sufficient competent evidence to sustain the decision."¹⁷ The district court of appeal reversed on the authority of the *Laisne* case, which it read as requiring a trial de novo.¹⁸ The supreme court held that the petitioner was not entitled to mandamus "as a matter of right" and that the "trial court may determine that the commissioner has not abused his discretion."¹⁹ The court was again divided, the minority finding that the commissioner's decision had actually been scrutinized and affirmed under the tests of certiorari rather than mandamus and that the present decision was contrary to the *Laisne* rule. Of particular interest was the concurring opinion of Justice Schauer, sitting for the first time on this issue, who frankly admitted that had he been on the bench when the *Laisne* case was heard, he would have voted with the minority of Gibson, Edmonds and Traynor.²⁰ However, he now felt impelled to concur "in effect" with the majority for three reasons: (1) the extreme trial de novo doctrine of the *Laisne* case had been modified by the *Dare* case to a point that (a) the administrative determination comes before the

Russell v. Miller (1943) 21 Cal. (2d) 817, 136 P. (2d) 318, decided the same day as the *Dare* case. This issue has now been settled by the addition of section 1094.5 to the Code of Civil Procedure which provides that the administrative record may be filed by either petitioner or respondent.

¹⁵ 21 Cal. (2d) at 809, 136 P. (2d) at 314.

¹⁶ (1943) 22 Cal. (2d) 138, 137 P. (2d) 425.

¹⁷ Quoted in the district court of appeal opinion. *Sipper v. Urban* (1942) 128 P. (2d) 882, 883.

¹⁸ *Ibid.*

¹⁹ *Sipper v. Urban*, *supra* note 16, at 141, 137 P. (2d) at 426. The court cited for the latter proposition *Newport v. Caminetti* (1943) 56 Cal. App. (2d) 557, 132 P. (2d) 897, a license-denying (as opposed to license-revocation) case; the proper scope of review where the agency has refused to issue a license is discussed later herein.

²⁰ 22 Cal. (2d) at 143, 137 P. (2d) at 427.

reviewing court "endowed with a strong presumption in favor of its regularity" and hence the petitioner must support "affirmatively, competently, and convincingly" his challenge of serious error of law or abuse of discretion, and (b) issuance of mandamus is within the sound discretion of the court which may grant or deny relief "in the interests of sound justice"; (2) to obtain certainty of relief, it is important that mandamus now be recognized as the proper review writ running to administrative adjudication, however erroneous be its present scope in the light of precedent; and (3) the issue had been foreclosed by the policy decision of the California electorate in rejecting Proposition No. 16 in the 1942 election.²¹

The few cases following *Sipper v. Urban* do not point up any particular general rule. Rather they suggest that the California appellate courts will continue to be guided by their own notions as to what is the right result in the particular case. Thus the *Dare* case²² clearly indicated that additional evidence should be admitted in mandamus proceedings only under stated exceptions.²³ However, in *Wyatt v. Cerf*²⁴ the district court of appeal found this to be dictum and not controlling. Nevertheless, the general trend of the cases has been to follow the *Dare* and *Sipper v. Urban* modifications;²⁵ it is probably safe to say that the record enters with some sort of presumption or inertia in its favor, and that the trial court may refuse to take additional evidence and affirm on the stated ground that there is substantial evidence to support the administrative determination.²⁶

The recent case of *Ratray v. Scudder*²⁷ poses the interesting question of whether the whole line of cases stemming from the *Standard Oil* case²⁸ has at last been tacitly overruled by the simple expedient of refusing to look at something one does not want to see. In the *Ratray* case, the majority of Gibson, Edmonds, Traynor and

²¹ Justice Schauer's declared predisposition to affirm the administrative judgment does not seem borne out by his vote in *Wyatt v. Cerf*, *infra* note 24, and *Ratray v. Scudder*, *infra* note 27.

²² *Supra* note 12.

²³ The *Dare* exceptions have now been partially codified. CAL. CODE CIV. PROC. § 1094.5.

²⁴ (1944) 64 Cal. App. (2d) 732, 149 P. (2d) 309, *hearing den.*, Gibson, Edmonds and Traynor, JJ., voting for hearing, Carter, J., not participating.

²⁵ *Madruza v. Borden Co.* (1944) 63 Cal. App. (2d) 116, 146 P. (2d) 273; *West Coast Etc. Co. v. Contractors' Etc. Bd.* (1945) 68 Cal. App. (2d) 1, 155 P. (2d) 863; *McDonough v. Garrison*, *supra* note 8. See also *Vaughn v. Board of Police Commrs.* (1943) 59 Cal. App. (2d) 771, 781, 140 P. (2d) 130, 135; *Friedland v. Superior Court* (1945) 67 Cal. App. (2d) 619, 626, 155 P. (2d) 90, 94.

²⁶ See *West Coast Etc. Co. v. Contractors' Etc. Bd.* (1945) 72 Cal. App. (2d) 287, 164 P. (2d) 811.

²⁷ (1946) 28 A. C. 228, 169 P. (2d) 371, *reh'g den.*, (June 18, 1946), 34 CALIF. L. REV. 772.

²⁸ *Supra* note 2.

Spence held that the trial court's substitution of its judgment for that of the real estate commissioner could find "no support in the evidence", and hence it was "not necessary to discuss the scope of review by the trial court of the commissioner's proceedings. . . ."²⁹ The sharply dissenting opinion of Carter (joined by Shenk and Schauer) took quite a different view as to the sufficiency of the evidence necessary to support the trial court's judgment.³⁰ Not only did they find substantial evidence in the record to support the outcome of the trial court's reweighing, but the opinion implies that the trial court was correct in finding that there was no fiduciary relationship (breach of such relationship being the theory upon which Rattray's license was revoked).³¹ Thus the trial judge and (seemingly) three of the supreme court justices were convinced that there was no principal-agent relationship between the licensee and the vendor whom the majority found to be his client; further, the two judges who heard the case in the district court of appeal found "evidentiary support" for the trial court's finding of no fiduciary relationship.³² The majority opinion was apparently influenced by a desire to sustain the judgment of the real estate commissioner for it was evident that Rattray's dealings amounted, at the very least, to rather sharp practice.

DENIAL OF PERMITS AND LICENSES

Several months after the decision in the *Drumme* case,³³ the supreme court decided in *McDonough v. Goodcell*³⁴ that the "reweighing" doctrine did not control judicial review of administrative deter-

²⁹ 28 A. C. at 233, 169 P. (2d) at 374.

³⁰ The dissent carefully pointed out the issue of administrative law involved, gave a short resumé of the mandamus-certiorari controversy mentioned in this note, and concluded that the majority opinion ". . . in fact, applies the rules applicable to certiorari." *Ibid.* at 241, 169 P. (2d) at 379. It then analyzed the facts and substantive law involved and ended with a reminder that the appellate court is bound to respect the findings of fact and inferences drawn therefrom by the trial court. The crowning irony to this discourse is a long quotation from *Estate of Bristol* (1943) 23 Cal. (2d) 221, 223, 143 P. (2d) 689, 690, which establishes the rationale of the substantial evidence rule for the trial court-appellate court relationship. The significant sentence of the quotation is re-quoted: "It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record." The dissent was not entirely unaware of the paradox of quoting a "first-hand impression" rationale in a case where the trial judge had himself substituted his judgment on a *printed* record of the administrative proceedings which admittedly contained ample evidence to sustain the administrative findings; the minority's answer is that otherwise different rules would have to be established for appellate review of oral evidence and for appellate review of deposition or affidavit evidence!

³¹ 28 A. C. at 240, 246, 247, 169 P. (2d) at 378, 382, 383.

³² *Rattray v. Scudder* (1945) 161 P. (2d) 260, 264.

³³ *Supra* note 5.

³⁴ (1939) 13 Cal. (2d) 741, 91 P. (2d) 1035, 123 A. L. R. 1205.

minations *denying* original issuances of licenses.³⁵ The Bail Bond Regulatory Act³⁶ required that all bail bond brokers secure permits to operate from the insurance commissioner. The latter was authorized to "refuse to issue any permit applied for unless it is made to appear that the applicant therefor is of good moral character and a fit and proper person to engage in the bail bond business."³⁷ The McDonough brothers, who had been in the business for over thirty years, duly applied for permits. After an extensive hearing, the commissioner denied their application, making his determination in the statutory language. After unsuccessful injunction and habeas corpus proceedings, petitioners brought an original writ of mandate in the district court of appeal. The latter, by a divided court, found that the McDonough brothers had acquired a vested property right which could not constitutionally be taken away without a judicial trial.³⁸

In a sense the district court of appeal foreshadowed the supreme court's opinion in the *Drummey* case handed down three and a half months later, and it was generally accepted that *McDonough v. Goodcell* would follow the reasoning of the *Drummey* case to allow the reviewing court, which after removal had become the supreme court, to "reweigh" the evidence. Nothing of the sort! *McDonough v. Goodcell* presented no issue of deprivation of a property right,³⁹ said the court, and thus the legislature could properly clothe the commissioner with "discretion" to deny permits on a finding that the applicant was not of good moral character and was not a fit and proper person. Such finding could be upset on mandamus only if the reviewing court found that the administrator's discretion had been exercised "arbitrarily, capriciously, fraudulently, or without a factual basis sufficient to justify the refusal."⁴⁰ The sufficient factual basis was defined as "evidence . . . sufficient to support . . . a verdict either way on the issue."⁴¹ In short, the court adopted the substantial evidence rule in permit-denying cases and thus aligned California with the overwhelm-

³⁵ For a discussion of the problems involved in license *renewals*, see *Hall v. Scudder* (1946) 74 A. C. A. 473, 168 P. (2d) 990.

³⁶ Cal. Stats. 1937, p. 1797.

³⁷ *Ibid.*, p. 1798.

³⁸ *McDonough v. Goodcell* (1938) 84 P. (2d) 281. See the dissenting opinion of Spence, J. (*ibid.* at 287), for an exceptional analysis of the issues involved and for his conception of the proper scope of judicial review. It is interesting to note that Justice Spence provided the pivotal vote in *Rattray v. Scudder*, *supra* note 27. Query: is the supreme court now ready to overrule the *Standard Oil*, *Drummey* and *Laisne* cases in doctrine as well as in result, when the proper case comes up?

³⁹ In view of petitioners' continued operation of their business for over thirty years, this distinction has seemed dubious on its facts as well as in theory to critics of the "trial *de novo*" doctrine. Gibson, C. J., dissenting in *Laisne v. Cal. St. Bd. of Optometry*, *supra* note 7, at 869, 123 P. (2d) at 478; *McGovney* (1941) *op. cit. supra* note 1, at 134.

⁴⁰ 13 Cal. (2d) at 747, 91 P. (2d) at 1039, 123 A. L. R. at 1211.

⁴¹ *Ibid.* at 749, 91 P. (2d) at 1040, 123 A. L. R. at 1212.

ing weight of authority as to the proper scope of judicial review of administrative adjudication.

The distinction between permit-denying and license revocation has been maintained in the decisions following *McDonough v. Goodcell*.⁴² While not essentially sound, one important area of administrative adjudication has thus been saved from the pernicious *Laisne* doctrine.

The recent case of *Transportation Bldg. Co. v. Daugherty*⁴³ throws some doubt on the rule of *McDonough v. Goodcell* as a guide for predictability in judicial treatment of the permit-denying cases. It also clearly illustrates the serious handicaps which judicial action can place upon a legislative program for regulation and reform.

The California Corporate Securities Act requires that a permit be obtained from the commissioner of corporations prior to a "sale" of securities.⁴⁴ "Sale" is defined to include "any change in the rights, preferences, privileges, or restrictions on outstanding securities."⁴⁵ The commissioner may issue a permit only if he finds "that the proposed plan . . . is not unfair, unjust, or inequitable."⁴⁶ Thus it is apparent that the legislature has repudiated the old "business judgment" rule under which the equity courts approved the recapitalization proposals of corporate managements or shareholder-majorities in the absence of a showing of gross unfairness, fraud or oppression.⁴⁷ Instead, the judgment of the commissioner is made determinative—that is, he has been granted adjudicative power to take evidence on factual issues and to decide the "ultimate" fact of presence or absence of fairness and equity. The California courts speak of this power as "discretion"; under the *McDonough v. Goodcell* rule, the reviewing court in mandamus may reverse only on a showing of "abuse of discretion".⁴⁸

In the instant case the corporation sought the commissioner's approval of a recapitalization plan which seriously impaired the rights

⁴² *Newport v. Caminetti*, *supra* note 19; *McDonough v. Garrison*, *supra* note 8; *Glick v. Scudder* (1945) 69 Cal. App. (2d) 717, 160 P. (2d) 90. See also *Dierssen v. Civil Service Commission* (1941) 43 Cal. App. (2d) 53, 60, 110 P. (2d) 513, 517; *Friedland v. Superior Court*, *supra* note 25, at 628, 155 P. (2d) at 95.

⁴³ (May 24, 1946) 74 A. C. A. 693, 169 P. (2d) 470, *reh'g den.*, (June 21, 1946), *hearing den.*, (July 18, 1946).

⁴⁴ CAL. GEN. LAWS, Act 3814 § 3.

⁴⁵ *Ibid.* § 2.

⁴⁶ *Ibid.* § 4.

⁴⁷ For discussion of this rule in operation, see Notes (1946) 20 TEMPLE L. Q. 123; (1945) 54 YALE L. J. 840.

⁴⁸ Such has been the accepted view of the commissioner's recapitalization-permit powers. See *Dahlquist, Regulation and Civil Liability under the California Corporate Securities Act: II* (1946) 34 CALIF. L. REV. 344, 351. Compare Mr. Dahlquist's discussion of the *Transportation Bldg.* case in installment IV of his series on the Act. (1946) 34 CALIF. L. REV. 695, 736, n. 97.

and privileges of the preferred shareholders. After hearing, the commissioner decided that he could not find that the plan was not unfair, and denied the application. On mandamus, the superior court "reweighed" the evidence in the administrative record, made independent findings of fact therefrom, substituted its judgment for that of the commissioner on the ultimate determination of fairness, and issued the writ.⁴⁹ The district court of appeal affirmed the trial court, but carefully skirted the administrative law issue of the proper scope of review by holding that there was *no evidence* to sustain those findings of the commissioner which were contrary to the findings of the trial court.

Now it was undisputed that the proposal considerably reduced the legal protection given the preferred shareholders by the articles of incorporation. The real issue was: who was invested by the legislature with power to decide if there were benefits sufficient to offset the loss of those legal rights? Obviously that power has been vested in the commissioner and the shareholder-majority necessary to ratify the plan, with final veto power given to the commissioner.⁵⁰ The court's opinion in *Transportation Bldg. Co. v. Daugherty*, although professing to go off on the "no evidence" point, actually holds that in the absence of fraud or oppression, the sound business judgment of the majority should prevail.⁵¹ Thus the decision limits the commissioner's power to that which was exercised by the equity courts under the business-judgment rule prior to the adoption of the Corporate Securities Act. Ignored is the manifest legislative purpose⁵² of affording urgently-needed⁵³ administrative protection to shareholder interests.⁵⁴

⁴⁹ The superior court judge evidently did not realize that this case fell within the rule of *McDonough v. Goodcell*, *supra* note 34. The following is quoted from the minute order: "The Court having considered the entire record of the evidence introduced and the proceedings had before defendant, and having *evaluated* the evidence and having made its *independent* findings and conclusions therefrom . . . [citing three license *revocation* cases, *Drummev v. State Bd. of Funeral Directors*, *supra* note 5; *Dare v. Bd. of Medical Examiners*, *supra* note 12; and *Sipper v. Urban*, *supra* note 16] finds that the evidence does not support the findings of defendant . . ." (Appellant's Opening Brief at 34. Italics added.)

⁵⁰ See *supra* note 48.

⁵¹ *Transportation Bldg. Co. v. Daugherty*, *supra* note 43, particularly at 697, 169 P. (2d) at 473.

⁵² The legislative intent would seem to be conclusively demonstrated by the 1945 amendments to section 2 of the Act, which articulated and expanded the commissioner's power over changes in corporate security structures. For a critical discussion of the implications of the 1945 amendment, see Dahlquist, *op. cit. supra* note 48, at 350-364.

⁵³ Frey, *Noteworthy Decisions in the Law of Private Corporations: 1940-1945* (1946) 94 U. OF PA. L. REV. 265, 290.

⁵⁴ Similar protection has been accorded under federal law by the Public Utilities Holding Company Act of 1935, 49 STAT. (1935) 803, 15 U. S. C. (1940) § 79. In addition, the SEC has been given advisory powers under Chapter X of the Chandler Bankruptcy

CONCLUSION

The present judicial definition of review by mandamus of administrative adjudication is then as follows: (1) in cases where the administrative tribunal has determined that petitioner's license or permit shall be suspended or revoked, the reviewing court may reweigh the evidence in the administrative record and reach independent findings of fact; (2) in cases where the administrative tribunal has determined that petitioner's application for a license or permit must be denied, the administrator's "discretion" must be upheld if supported by substantial evidence.

Our two most recent cases in effect run squarely against these rules. Thus in *Ratray v. Scudder*,⁵⁵ a license-revocation case, the reviewing court's "reweighing" was reversed by the appellate court, and the administrative tribunal's determination reinstated. In *Transportation Bldg. Co. v. Daugherty*,⁵⁶ a permit-denying case, the appellate court sustained a "reweighing" by the reviewing court. In both cases the appellate court purported to overrule no settled doctrine, but instead squeezed its holding into the established rules by finding "no evidence" to support the determinations of the tribunal (administrative or judicial) with which it disagreed. While these two cases furnish no doctrinal help in predicting the future course of judicial review or administrative adjudication, it is possible that they foreshadow a simultaneous abolition of the distinction between revocation and permit-denying by reestablishing certiorari review for the former and reaffirming it for the latter.

*Harry V. Bamford.**

Act, 52 STAT. (1938) 883, 11 U. S. C. (1940) § 501. See Dodd, *The Relative Rights of Preferred and Common Shareholders in Recapitalization Plans under the Holding Company Act* (1944) 57 HARV. L. REV. 295; Dodd, *Investor Protection by Administrative Agency: The United States Securities and Exchange Commission* (1942) 5 MODERN L. REV. 174; Note (1940) 2 LA. L. REV. 693. The federal courts have consistently held that judgment determinations by the SEC under the statutory "fair and equitable" standard should be scrutinized only to determine if they are backed by "substantial evidence" or have a "reasonable basis". Securities Comm'n v. Chenery Corp. (1942) 318 U. S. 80, 94; New York Trust Co. v. Securities and Exchange Com. (C. C. A. 2d, 1943) 131 F. (2d) 274, cert. den., (1943) 318 U. S. 786; City Nat. Bank & Trust Co. v. Securities & Exch. Com'n (C. C. A. 7th, 1943) 134 F. (2d) 65; *In re Securities and Exchange Commission* (C. C. A. 3d, 1944) 142 F. (2d) 411, aff'd sub nom. Otis & Co. v. S. E. C. (1945) 323 U. S. 624; *In re Standard Gas & Electric Co.* (C. C. A. 3d, 1945) 151 F. (2d) 326, cert. den., (1946) U. S., 66 Sup. Ct. 820; *City of North Miami Beach, Fla. v. Federal W. & G. Corp.* (C. C. A. 5th, 1945) 151 F. (2d) 420; *In re Laclede Gas Light Co.* (E. D. Mo. 1944) 57 Fed. Supp. 997, aff'd sub nom. Massachusetts Mut. Life Ins. Co. v. Securities & E. Comm. (C. C. A. 8th, 1945) 151 F. (2d) 424, cert. den., (1946) U. S., 66 Sup. Ct. 817; *In re New England Power Ass'n* (D. Mass. 1946) 66 Fed. Supp. 378.

⁵⁵ *Supra* note 27.

⁵⁶ *Supra* note 43.

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