SOME PRACTICAL PROBLEMS IN ADMINISTRATIVE LAW

Today, it is realized that the important problems in administrative law are those which deal with the practical aspects of the trial of cases before administrative tribunals. It is a patent fact that there has been a complete collapse of the doctrine of the separation of powers; and the emphasis placed upon judicial review is beating a forced retreat in the light of judicial self-limitation.

It is the purpose of this article, in a general way, to review some of the more important judicial decisions which have influenced the development of administrative procedures. It will readily be seen that a considerable body of law has been created, both in the sphere of federal and state activity. Although our state decisions are less familiar than the federal cases, they cover many of the more important problems.

1. *The Right to Notice and an Opportunity to be Heard*

In the consideration of whether an administrative body must give notice and an opportunity to interested parties to be heard, the ultimate legal problem is whether the procedure utilized satisfies the constitutional guarantee of due process.[1] While our courts have reiterated that due process does not always require judicial process, they have generally considered notice and hearing as requisite to legitimate administrative action and have enforced this requirement through the process of judicial review.[2] The real problems arise in connection with the modifications of and exceptions to the general rule.

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1. See GELLHORN, ADMINISTRATIVE LAW — CASES AND COMMENTS (1940), p. 331.

2. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW (1927) c. 3.

The first important exception is applied when the administrative agency is acting in a legislative as distinguished from a judicial capacity. In the well-known *Newark Milk Company* case,[3] the Court of Errors and Appeals refused to invalidate an order of the Milk Control Board fixing minimum prices to be charged for fluid milk on the ground that the order had not been preceded by notice and that no opportunity to be heard had been given to the company involved. Mr. Justice Heher, writing the opinion, said:

> "In the absence of a specific constitutional or statutory requirement thereof, notice of proceedings before the subordinate body exercising, as here, the administrative function is not requisite to valid action by that body. Nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The due process clause of the Fourteenth Amendment imposes no such requirement; and, for obvious reasons, the like clauses in the state constitution bear the same construction."

It is to be noticed that the opinion specifically refers to the action of an administrative body exercising an "*administrative function.*" This may cause considerable confusion, for the myriad activities of a typical agency might soundly be designated as "administrative," yet they comprehend results which the courts undoubtedly would invalidate in the absence of notice and a hearing. It is hoped that the opinion will be limited to its actual holding: that notice and an opportunity to be heard is not necessary to the legitimate exercise by an administrative agency of a function essentially legislative[4] in nature.

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3. State *ex rel.* State Board of Milk Control v. Newark Milk Co., 118 N.J.Eq. 504 (E. & A. 1935).

4. Price-fixing is in the realm of legislative action. See United States v. Morgan, 85 L. ed. 928, 931 (1941).

An opportunity to so restrict the holding shortly may be presented to the courts, for an attack has been made on an order of the board revoking a dealer's license on the ground that members of the agency "sit in judgment" on their competitors, thus denying due process.[5] If this contention is upheld, it necessarily will be predicated on the fact that self-interest prevents the board members from giving a fair hearing. Since the *Newark Milk Company* case held that *no* hearing was required, the court will have to resort to the process of distinguishing cases. The only difference to be found in the two cases lies in the nature of the functions being performed. In the first case, price-fixing was involved—a function considered in the realm of legislative activity.[6] In the pending case, the contest concerns the revocation of a license, and a revocation proceeding assumes judicial characteristics.[7] The court therefore could hold that a fair hearing was necessary and still be consistent with its earlier opinion. Whether or not, there was a fair hearing is another question and is discussed later on.[8]

Another exception to the requirement of notice and hearing,

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5. See *Newark Evening News*, Wednesday, Feb. 18, 1941, p. 7, col. 1: "On charges that two members of the State Milk Control Board used their powers arbitrarily and unconstitutionally against a competitor, Vice Chancellor Kays yesterday temporarily restrained enforcement of a board's order revoking the dealers license of Meadow Brook Farms, Inc., of Blairstown. The court directed the Board to show cause March 1 why the injunction should not be made permanent. A petition presented the court attacked the constitutionality of the act creating the board on the ground that members of the board can sit on judgment on competitors." No further disposition of the case has been noted. *Compare*, Johnson v. Milk Marketing Board, 295 N.W. 346 (Mich. 1940), wherein the Michigan court, in a proceeding brought by the board to restrain a distributor from violating a minimum price order, invalidated an act, similar to the New Jersey act, on the ground that it denied due process because a majority of the board members had a direct pecuniary interest in the matters submitted to them.

6. *Supra*, note 4.

7. Drive-to Department Stores v. Newark, 115 N.J.Eq. 222 (Ch. 1934).

8. *Semble*, the discussion under the heading of bias in administrative hearings, *infra*.

and one which may have a bearing on the pending case above discussed, relates to the problem of license revocations.

In *Garford Trucking Inc. v. Hoffman,*[9] a writ of certiorari brought up for review the revocation of prosecutor's motor vehicle registration certificates. The Deputy Motor Vehicle Commissioner had conducted a hearing, but the prosecutor had taken no active part therein except to object to the commissioner's jurisdiction. In affirming the revocation and in answer to the contention that the failure of the act to prescribe the procedure to be followed at revocation hearings deprived prosecutor of property without due process of law, the Supreme Court (per Mr. Justice Perskie) said:

> "It is well settled that a license to operate a motor vehicle is a mere privilege; it is in no sense a contract or a property right * * * and thus it has been held that a revocation of such a license, even without notice, does not deprive the licensee of his property without due process of law or otherwise, so long as the licensee is given the right of appeal or review of the revocation."[10]

The privilege-property concept finds its greatest expression

9. 114 N.J.L. 522 (Sup. Ct. 1935).

10. Compare the following language in National Automobile Service Corp. v. Barford, 289 Pa. 307, 137 A. 601 (Pa. Sup. Ct. 1927): "We have as a fixed principle in our law that no man shall be adjudged in person or property without notice and an opportunity to appear and be heard * * * To condemn without a hearing is repugnant to the due process clause * * * In applying this general rule it must be remembered that there are certain classes of decisions that are not appropriate for a judicial body to make though they vitally affect private rights; this is because of the nonjudicial character of the investigation or proceeding. Therefore, due process is not necessarily judicial process * * * The requirement of due process of law, however, applies to administrative as well as judicial proceedings. The doctrine of notice and hearing thus becomes a more potent force in our land, because it applies to the decisions and acts of administrative officials, and, unless there are extraordinary emergencies, this essential requisite of due process cannot be dispensed with."

in New Jersey in cases dealing with liquor licenses.;[11] but other courts have extended it to licenses to maintain dance halls,[12] pool-rooms[13] and popcorn stands,[14] though they refuse to apply it to licenses to engage in a particular profession.[15] Summary revocation has been sanctioned, also, in situations where the licensee's activities are deemed detrimental to the health or well-being of the community.[16]

Thus it is that in the pending milk control case,,[17] assuming bias on the part of the board members, the court might hold that a dealer has no *right* to a hearing since the license conferred a mere privilege or that summary revocation is justified in the interest of the community's well-being.[18]

But it is hoped that the court goes further and re-examines

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11. Paul v. Gloucester County, 50 N.J.L. 585 (E. & A. 1888); Gaine v. Burnett, 122 N.J.L. 39 (Sup. Ct. 1939). *Cf.* Bumball v. Burnett, 115 N.J.L. 254 (Sup. Ct. 1939). But see, *contra*, Lambert v. Rahway, 58 N.J.L. 578 (Sup. Ct. 1896) and Balling v. Elizabeth, 79 N.J.L. 197 (Sup. Ct. 1909).

12. Mehlos v. Milwaukee, 156 Wisc. 591, 146 N.W. 882 (1914).

13. Commonwealth v. Kinsley, 133 Mass. 578.

14. Vernakes v. South Haven, 186 Mich. 595, 152 N.W. 919 (1915).

15. See *Ex parte* Robinson, 86 U.S. 505 (1873) (lawyer); *Ex parte* Heyfron, 7 How. (Miss.) 127 (1843) (lawyer); People v. McCoy, 125 Ill. 289, 17 N.E. 786 (1888) (doctor); Kalman v. Walsh, 355 Ill. 341, 189 N.E. 315 (1934) (dentist); Klafter v. Examiners of Architects, 259 Ill. 15, 102 N.E. 193 (1913) (architect).

16. People *ex rel* Lodes v. Department of Health, 189 N.Y. 187, 82 N.E. 187 (1907)—revocation of permit to sell and deliver milk from wagons; State *ex rel* Nowotny v. Milwaukee, 140 Wisc. 38, 121 N.W. 658 (1909)—revocation of milk dealer's license; General Recreation Co. v. Edgerton, 172 App. Div. 464, 158 N.Y.Supp. 421 (1916)—revocation of moving picture theater license where theater was in a dangerous condition.

17. See *supra*, note 5.

18. In Nebbia v. New York, 291 U.S. 502 (1935) the United States Supreme Court held that the milk business was a proper subject for regulation since the industry is subject to the exercise of the police power in respect to rules of proper sanitation; and in the Newark Milk Company case, *supra*, note 3, equity's right to enjoin the sale of milk was upheld on the ground that it was in the interest of the health and well-being of the community.

the whole field of summary license revocations; for it might properly be asked whether summary revocation should in any instance be sanctioned.

Since the act of revocation calls for a final determination, it seems only just and to the interest of a well-considered administrative decision to afford the interested party an opportunity to be heard before imposing the final penalty. The privilege-property concept, furthermore, is patently unrealistic; for, by whatever it is known, the interest of the licensee in his license is substantial. This was pointed out by Mr. Justice Minturn in *Balling v. Elizabeth*:[19]

> "And while it has been determined by this court that a license to keep an inn or tavern is not a contract, but a mere privilege to do business * * * still, as a mere privilege to do business, the license must be assumed to have had some value at the time of its revocation. But more important to this prosecutor, and more significant from a legal point of view, is the fact that the prosecutor by this action was in fact penalized and required to suffer an enforced ostracism from his chosen licensed occupation for one year."

It has recently been suggested[20] that the proper procedure to be developed is one which calls for a summary *suspension* of a license pending an opportunity to the licensee to be heard on the question of whether his authority should be permanently revoked. Such a procedure, it is submitted, will achieve a proper balance between the need for immediate public protection against continued activity by a licensee misusing his power and the prevention of ill-advised administrative action destroy-

19. 79 N.J.L. 197 (Sup. Ct. 1909).

20. GELLHORN, *supra*, note 1, pp. 372-382.

ing a licensee's reputation or investment without affording him an opportunity to defend himself.

2. *Acceptable Materials for Administrative Decision*

Another practical problem met by the lawyer practicing before administrative tribunals concerns the role played by the traditional or common law rules of evidence.

The rules of evidence applied in judicial proceedings developed at a time when facts were found and determined by inexpert bodies and were designed to insure the presentation of trustworthy material to untrained individuals.[21] The inherent differences between the common law jury and the modern administrative agency justify the application of different rules of proof and require administrative action to be bound by legal rules of evidence only insofar as those rules actually achieve the ideal of justice and fairness which they were created to insure.[22]

In a great number of instances, the legislature has sanctioned relaxation of the rules of evidence. Thus, the Board of Public Utility Commissioners, the Milk Control Board and the Racing Commission are expressly freed from following "the technical

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21. Stephan, *The Extent to Which Fact-Finding Bodies Should be Bound by the Rules of Evidence* (1939) 18 ORE. L. REV. 229, 232.

22. STEPHAN, *supra*, note 21. *The Report of the Attorney-General's Committee on Administrative Procedure* (1941) contains the following comment (p. 70): "The absence of a jury and the technical subject-matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the 'common law rules' of evidence for jury trials. Such a requirement would be inconsistent with the objectives of dispatch, elasticity, and simplicity which the administrative process is designed to promote. An administrative agency must serve a dual purpose in each case: It must decide the case correctly as between the litigants before it, and it must also decide the case correctly so as to serve the public interest which it is charged with protecting. This second important factor makes it necessary to keep open the channels for the reception of all relevant evidence which will contribute to an informed result."

rules of evidence"; in formal compensation proceedings "the official conducting the hearing shall not be bound by the rules of evidence"; and proceedings before the Board of Tax Appeals "shall be conducted in accordance with such rules of evidence and procedure as the board from time to time may prescribe." In those conspicuous instances where the statutes are silent (*e.g.*, Department of Alcoholic Beverage Control, Department of Motor Vehicles, Civil Service Commission) the agencies, in actual practice, do not adhere to the strict rules of evidence. That they are justified in adopting such a procedure is evident from the rule applied to federal administrative proceedings and recently expressed by Chief Justice Stone:

> " * * * it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies *in the absence of a statutory requirement that such rules are to be observed.*"[23] (emphasis supplied)

What has been said does not mean that all of the rules of evidence have been summarily abandoned. Indeed, it has been the writer's observation that far more common law principles have been retained than have been discarded. Conversation with many agency heads revealed that they feel themselves bound to what is generally termed as "legal" evidence, even though the legislature has given them freedom to depart from the rules of evidence. In a reported decision, for example, the workmen's compensation bureau held that an award must be based upon "legal evidence."[24]

The attitude of the administrators can be traced to a great degree to the attitude of the courts toward departures from

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23. Opp Cotton Mills v. Administrator of the Wage and Hour Division, etc., 61 Sup. Ct. 524, 537 (1941).

24. Dietz v. Eagle Grocery Co., 14 N.J.Misc. 240 (Dept. of Labor, 1936).

the rules of evidence in administrative proceedings. Judges, on occasion, are prone to invalidate a determination reached by means of a procedure which does not conform to the accepted judicial procedure. For example, in spite of the legislative pronouncement that the official conducting a compensation hearing "shall not be bound by the rules of evidence," the courts have said that "the bureau cannot * * * disregard the fundamental rules of judicial proof."[25] The most vigorous judicial statement is found in an unreported decision dealing with the procedure employed by the Milk Control Board in a hearing leading to a license revocation.[26] The illustrative portion of the opinion is set out below[27] and it demonstrates the type of deci-

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25. Friese v. Nagle Packing Co., 110 N.J.L. 588 (E. & A. 1933).

26. Milk Control Board v. Fines, Chancery Docket 105/460. Opinion filed 1935, by Vice Chancellor Berry.

27. "This matter should not be disposed of, however, without some comment on the apparent unfairness to the defendants in the proceedings before the Board. I have no intention of impeaching the Board's conduct nor of attempting to review its findings; but I am of the opinion that the Assistant Attorney-General who prosecuted the case went beyond the bound of legal propriety in the examination of his witnesses. * * * (He) asked his witnesses leading questions, he permitted them to give hearsay testimony. He cross-examined them. He tried to get them to testify regarding discounts and rebates alleged to have been given by the defendants even though the witnesses kept denying that there were any such discounts or rebates, reminded them that they might be liable to have their licenses rescinded if they failed to cooperate with the Board, if they did not tell the truth, and if they did not pay milk board prices. He asked one of his own witnesses if he had not been convicted of a crime and if he had not been sentenced. He permitted a competitor of respondents to testify that he heard that the respondents were selling milk at other prices than those fixed by the Milk Board. He permitted the chairman of the Board to read a letter produced by a witness but which was not legally admitted in evidence. The procedure at the hearing before the Board smacks of the practices recently condemned by the United States Supreme Court in U. S. v. Berger. The primary duty of counsel engaged in a public prosecution (and that is the position of the Assistant Attorney-General here) is not to convict, but to see that justice is done. Illegal means adopted to secure conviction, however desired, should be condemned. The state does not seek victims—only impartial justice."

sion which compels administrators to conform procedures to a pattern which will escape such condemnation.

The most controversial evidence problems deal with the admissibility and effect of hearsay and with the extent to which "judicial notice" by administrative tribunals is permissible.

(a) Hearsay.—*Carroll v. Knickerbocker Ice Co.*[28] is a leading case on the subject of hearsay. There a workman suffered an epigastric hemorrhage which led to his death. Witnesses, one of whom was the decedent's wife, testified before the New York State Commission that the decedent had stated that he had been injured while at work. Other witnesses who were with the decedent at the time of the alleged accident testified that they saw no such occurrence and physicians stated that there were no bruises or abrasions on the decedent's body when they examined him subsequent to his injury. The Commission found that death resulted from an accident incurred in employment. The New York Court of Appeals (two judges dissenting) reversed the Commission, saying:

> "The act may be taken to mean that while the Commission's inquiry is not limited by the common law or statutory rules of evidence or by technical or formal rules of procedure, and may, in its discretion, accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made."

Judge Pound, in dissent, was of the opinion that if the hearsay testimony had any probative force, "its weight was for the Commission as triers of fact, and their decision thereon was final." Judge Seabury, also dissenting, thought that "If the legislature sanctioned the admission of [hearsay], it follows

28. 218 N.Y. 435, 113 N.E. 507 (1916).

by necessary implication that it intended to authorize the Commission to act upon it."

The rule of the majority of the Court of Appeals—that while hearsay is admissible, a determination cannot be sustained on hearsay alone, but must be supported by a "residuum of legal evidence"—has been widely followed by the courts of other states, no matter what provision concerning the use of common law rules of evidence appears in the statute.[29] It was given vigor by the United States Supreme Court in the comparatively recent *Consolidated Edison* case,[30] wherein it was said:

> "The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order * * * But this assurance of a desirable flexibility does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."[31]

New Jersey is in accord with the general rule, as announced in the *Carroll* case. The Court of Errors and Appeals has ruled that the Workmen's Compensation Bureau may *receive* hearsay without affecting the validity of an award; but as "substantial rights" must be ascertained from "competent evidence" hearsay cannot form the basis of an award.[32] In connection with the

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29. Dodd, Administration of Workmen's Compensation (1936), pp. 227-236.

30. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197 (1938).

31. *Cf.* National Labor Relations Board v. Remington Rand, Inc., 94 F. (2d) 862 (C.C.A. 2d, 1938).

32. Helminsky v. Ford Motor Co., 111 N.J.L. 369 (E. & A. 1933).

reception of hearsay, it is interesting to note that the New Jersey Supreme Court has indicated that the provision of the act concerning the rules of evidence *requires* the admission of hearsay and that its exclusion is "technical error" though "not one requiring reversal."[33]

The writer does not subscribe to a general rule which would render impotent the utilization of hearsay testimony by administrative agencies. It is generally recognized that hearsay has considerable probative value.[34] Courts have repeatedly held that if evidence of a hearsay character is not objected it must be given its full weight.[35] Its materiality cannot be objected to; and, it seems reasonable to assume, that administrators trained by experience are competent to determine what is and what is not credible. The same motivating forces behind the oft-proposed idea of doing away with the rules of evidence in the Court of Chancery lend support to a similar proposal with respect to administrative tribunals.

It is therefore submitted that in any situation where circumstances render hearsay the best evidence available, and where the justice of the case requires it, the agency should be permitted to rely on hearsay evidence, provided such reliance is reasonable.[36]

(b) Official Notice.—It is well known that courts do not require proof of facts "notorious to the community";[37] instead they take judicial notice of them. An administrative agency may take notice "of the same kind of facts which a court

33. Friese v. Nagle Packing Co., *supra*, note 25.

34. See Note (1916) 29 HARVARD L. REV. 208, 210.

35. Barlow v. Verrill, 88 N.H. 25, 183 A. 857 (1936); and see Hubbard v. Allyn, 200 Mass. 166, 171, 86 N.E. 356 (1908).

36. Stephan, *Fact-Finding Boards and the Rules of Evidence* (1938) 24 A. B. A. J. 630, 637.

37. See Ohio Bell Telephone Co. v. Public Utility Commissioners of Ohio, 301 U.S. 292 (1937), quoting 5 WIGMORE, EVIDENCE, sec. 2583.

notices";[37a] but in the course of their activities agencies acquire a special knowledge of facts which become as obvious to them as facts susceptible to judicial notice are to judges.[38] A truly live problem in administrative law concerns the extent to which official notice may be taken of facts of this character.

The federal decisions discourage an extended use of the processes of official notice by administrative agencies. In *Interstate Commerce Commission v. Louisville & Nashville R. Co.*,[38a] the court rejected a contention by the government that a rate order could be "presumed" to have been supported by information not in the record: The court said:

> "In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding."

Even more prohibitive is the opinion of Mr. Justice Cardozo in *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*,[39] In that case a state agency, in a rate proceeding, took "judicial notice" of a certain price trends and land values. The

37a. *Report of the Attorney-General's Committee on Administrative Procedure* (1941), p. 71.

38. *Id.*

38a. 227 U.S. 88 (1913).

39. *Supra*, note 37.

court disapproved of this practice on two grounds: First, because the facts officially noticed were not characterized by a "rational concept of notoriety," and, second, because it created a finding of fact based on "unknown and unknowable" evidence, thus rendering impossible judicial review designed to ascertain whether the findings were supported by evidence.

State courts have been more liberal. Thus, one court paid respect to the knowledge of an industrial commission that "hernias are a matter of gradual development" and stated that on such a subject the commission's "knowledge and experience" places them at liberty to disregard expert testimony to the contrary.[40] And in *Wards Case*[41] it was stated that an Industrial Accident Board "has the right to use the practical knowledge and every-day experience of its members" in determining a question of dependency.

One of the leading cases emanates from New Jersey. In *City of Elizabeth v. Public Utility Commissioners*,[42] an attack upon a water rate increase was based upon an assertion that the commission had considered evidence outside the record. An inventory and appraisal submitted by the municipality was checked by engineers of the board and the appraisal was subjected "to a careful analysis by a study of the unit prices and a comparison of the prices used with similar figures used by the board in other appraisal work. The court held that the board acted within its powers in using knowledge obtained in other proceedings, saying:

> "It would be almost impossible for any board not to use the knowledge which it has obtained in other proceedings in weighing the evidence in the case which it has under consideration * * * "

40. McCarthy v. Sawyer-Goodman Co., 194 Wisc. 198, 215 N.W. 824 (1927).
41. 286 Mass. 72, 190 N.E. 25 (1934).
42. 99 N.J.L. 496 (E. & A. 1924).

The New Jersey court, in the above case, recognizes the very essence of the problem. "For each hearing to be considered as a phenomenon, rather than as a portion of a series of shaping and developing the field in which the agency operates, is to disregard the function of the administrative process."[43] To require proof of general propositions of which an agency has knowledge by reason of the accumulation of experience and expertness not only prolongs hearings in situations wherein expedition is generally desirable and often necessary but adds unnecessary expense.

This does not mean that agencies should not apprise the parties of what is to be officially noticed in order that they may refute, explain or qualify. Such acquaintance may be offered at the hearing, when possible; or, if impossible (due to the difficulty of foretelling how the issues will be shaped or what facts will be relevant), at the time of an intermediate report. This is necessary not only in fairness to the parties, but to enable the reviewing court to determine the factors entering into the administrative determination.

3. *The Accepted Standards of a "Fair Hearing"*

(a) In General.—Administrative procedure should afford the fundamentals of fair play.[44] "A full and fair hearing should be the tradition of our system," says Dean Landis,[45] who at the same time points out that there can be "no simple patent formula" defining the content of that principle. But, though administrative hearing procedures must necessarily vary with the character of the function being discharged, certain fundamental considerations apply throughout.

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43. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS (1941), pp. 86-87.
44. F. C. C. v. Pottsville Broadcasting Co., 60 Sup. Ct. 437 (1940).
45. Landis, *Crucial Issues in Administrative Law* (1940) 53 HARV. L. REV. 1077, 1101.

For example, as a guaranty against arbitrary methods, hearings generally should be public. Invariably they are public,[45a] with the few exceptions being amply justified.[46] Other elements of fairness require that the hearing be conducted in an orderly and dignified manner,[47] though not necessarily in a "formal" manner; and that the party to the proceedings have the right to be represented by counsel,[48] and the right to testimony under oath.[49]

(b) Bias in its relation to the "fair hearing."—It is frequently alleged that administrative hearings are impregnated with bias and impartiality, and a "fair" hearing is an impossibility.

Frequently this contention is founded on the fact that an agency is authorized both to institute and to adjudicate proceedings. To allow the one who resolves to maintain an action to appraise the facts and arguments against the propriety of the action, it is said, violates the time-honored dogma that "no man should be the judge of his own cause."

It cannot be said that the courts have considered this a serious obstacle. In *Brinkley v. Hassig*,[50] Circuit Judge McDermott commented on "the spectacle of an administrative tribunal

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45a. *Report of the Attorney General's Committee on Administrative Procedure* (1941) p. 68.

46. For example, one of the few exceptions in New Jersey concerns hearings before the Banking Commissioner and can be justified on the ground that the financial stability of a banking institution require hearings to be of a private nature. The Department of Alcoholic Beverage Control often conducts private revocation proceedings where the issues involve immorality on licensed premises. In such a situation there is little to gain by subjecting the hearing to public scrutiny.

47. *Report of the Attorney-General's Committee on Administrative Procedure* (1941), p. 69.

48. GELLHORN, *supra*, note 1, pp. 582-587.

49. *Id.*, pp. 591-594.

50. 83 F. (2d) 351 (C.C.A. 10th, 1936).

acting as both prosecutor and judge" but held that such procedure violated no constitutional right.

The problem is generally conceived as being for the political scientist rather than the courts; and all investigations of the administrative process have attempted a solution. It has been suggested that agencies be structurally organized into two independent parts, one to adjudicate and the other to administer,[51] and the recent Report of the Attorney General's Committee on Administrative Procedure seeks to solve the problem by the creation of independent hearing commissioners insulated from all phases of a case other than hearing and deciding.[52]

It is not within the scope of this article to examine the merits of the proposed solutions, but the writer feels that it is appropriate to point out that students of the administrative process generally feel that the "judge, jury, prosecutor" cry is overdone—conceding, at the same time, that a commingling of the functions of investigation and advocacy with the function of deciding, if shown to exist to such an extent as to prevent a dispassionate judgment, is undesirable.

In connection with the above, it has been pointed out that "an administrative agency is not one man or a few men but many," and that it is a mistake to conceive of an agency "as a collective person" and to conclude "that, because the agency initiates action and renders decision thereafter, the same person is doing both."[53] Recently, a leading scholar considered the problem and, finding but four examples in the whole field where a single individual is regularly both advocate (or investigator) and adjudicator, concluded that "In its baldest terms the com

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51. See *e.g., Report of the President's Committee on Administrative Management* (1937), pp. 40-42.

52. *Report of the Attorney-General's Committee on Administrative Procedure* (1941), pp. 43-60.

53. *Id.*, p. 55.

bination of 'judge' and 'prosecutor' is so aberrational as to be all but ignored."[54]

The question of bias has also arisen in connection with a prior position or stand taken by administrators on a general question but which litigants urge creates a prejudgment of their particular case.

Generally it may be said that neither sincere conviction as to public policy which may cause a possible predisposition toward one rather than another view[55] nor actual pronouncement showing a definite state of mind constitute a sufficient reason for disqualification. Indeed, the courts have created a rather strong presumption that the members of an agency will

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54. GELLHORN, *supra*, note 43, p. 24.

55. *Cf.* Jaffe, *Invective and Investigation in Administrative Law* (1939) 52 HARV. L. REV. 1201, 1218, 1219: "It may well be that a sincere conviction as to public policy predisposes the mind where it might otherwise be in a position of doubt or balance on a conflict of fact or a choice of applicable principle. But to announce out of hand that such a state of mind constitutes a 'disqualification' is in part quixotic and in part non-sequitur. A strong and sincere conviction as to certain laws may exist and undoubtedly often does exist in judges. During prohibition, for example, there must have been a great number of judges who disapproved of the law just as many disapprove of the anti-trust laws. Juries, notoriously, may believe that plaintiffs should recover from insured defendants regardless of negligence. If emotionally determined values constituted a disqualification, judges would be under constant attack and judicial constitutional law non-existent. Nor is this entirely a matter of necessary evil. Certain persons give thanks for the predispositions of Mr. Justice Butler and certain others looked upon Mr. Justice Holmes' prejudices in favor of free speech as the most precious of safeguards. The common man juror's prejudice against insurance companies is probably the herald of a desireable change in the accident law. Pecuniary interest in the judge brings into any one litigation a purely capricious, fortuitous bias having no relation to the competing social values in the case before him. It does not follow that a hatred of monopoly is inappropriate in a Federal Trade Commissioner or of espionage and employer violence in a Labor Board Commissioner. It must be admitted that such a man is liable to find monopoly or espionage where an indifferent man would be in doubt. Put in another way it might be said that presumptions arise from special experience and conviction * * * "

act without bias or prejudice.[56] The leading case where disqualification was ordered, significantly, was a determination of the Federal Communications Commission. *In the matter of Segal and Smith*,[57] respondents, after several unsuccessful preliminary motions, filed a formal motion addressed to the commission and moving them to disqualify one of their members from participating in the matter before them. The motion was supported by an affidavit in which personal malice was alleged. In granting the motion, the commission held (1) that in quasi-judicial, as well as judicial, proceedings "participation by a biased, prejudicated or malicious judge or quasi-judicial officer is repugnant to our system of laws," and the quasi-judicial body itself has jurisdiction "to maintain its judicial integrity" and determine a motion to disqualify one of its members; (2) that a showing of personal prejudice is sufficient to create a disqualification; and (3) that the commission may grant a motion to disqualify one of its members without an investigation, if the motion is supported by an affidavit.

United States v. Morgan[58] undoubtedly will become a leading decision on the question of bias in connection with administrative tribunals. This case which originated in 1930 and went to the United States Supreme Court four times, involved the fixing of rates to be charged by market agencies for their services at the Kansas City Stockyards. Immediately following the decision of the court in the second Morgan case[59] upsetting a rate order because of procedural defects, the Secretary of Agriculture (the administrative officer involved) dispatched a lengthy letter to the *New York Times* in which he expressed

56. Montana Power Co. v. Public Service Commission, 12 F. Supp. 946 (D. C. Mont., 1935); Georgia Continental Telephone Co. v. Georgia Public Service Commission, 8 F. Supp. 434 (D.C. Ga., 1934).

57. 5 F. C. C. 3 (1937).

58. 85 L.Ed. 928 (1941), *rev'g* 32 F. Supp. 546.

59. Morgan v. United States, 304 U.S. 1 (1937).

the hope that "the day will come when the Supreme Court will recognize a menace far greater than that contained in any of the quasi-judicial agencies — namely, the tendency of some corporation lawyers and courts to drag out their proceedings to an interminable length," and in which he expressed a desire to place the matter before "the final court of appeal in the United States," that is, "the bar of public opinion." The secretary's letter further stated that "if the Solicitor of the preceding administration could have had some sense of prophetic warning he could have saved to the farmers of the Kansas City area at least $700,000 which rightfully belongs to them and which will now go to the commission men and their attorneys."

The market agencies in due course moved to disqualify the Secretary in proceedings started by him to fix new rates. The motion was denied by the Secretary and his action was upheld. Mr. Justice Frankfurter writing the opinion said:

> "That he (the Secretary) not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this court. As well might be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. Both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its

> own circumstances. Nothing in this record disturbs such an assumption."

A review of the decisions renders inescapable the conclusion that administrative tribunals are not required to meet a higher standard of impartiality than judicial tribunals.

(c) Requirements as to the formulation of the charges or issues for adjudication.—In the second *Morgan* case,[59a] Chief Justice Hughes, in invalidating the Secretary's order, said:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the government proposes and to be heard upon its proposals before it issues its final command."

The precise holding of the case is difficult to perceive, for all devices for apprising the parties of the issues were missing: there was no specific complaint, no tentative findings of the examiner to which exceptions might have been taken, no issue defining oral argument by the government, and no filing of briefs by the government. But most writers felt that the controlling point was the absence of an examiner's report and that the decision of the court imposed such a requirement in all cases where an examiner heard the evidence rather than the individual making the determination,[60] even though the court, in denying a motion for a rehearing, stated, "Our decision was

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59a. *Id.*

60. *E.g.*, Sears, *The Morgan Case and Administrative Procedure* (1939), 7 GA. WASH. L. REV. 726, 735.

not rested upon the absence of an examiner's report." It now appears, however, that there is no such general requirement and administrative determinations will be upheld if, from the record, it appears that the parties have actually been advised of the issues involved.[61] Thus, in *N.L.R.B. v. Mackay Radio & Telegraph Co.*,[62] complaint was made that there was no examiner's report, but the court denied the validity of the argument in view of the fact that the record disclosed that the respondent understood the issue and thus had been given a full hearing. At best, it can only be stated that the general rule is as announced, but that it is impossible to lay down any general requirements as to particular techniques which must be employed in apprising parties of the issues.[63]

(d) The requirement that the one who decides must read or hear the testimony.—In the first *Morgan* case,[64] it was alleged on information and belief that the Secretary of Agriculture had issued a rate order without personally having heard argument or read the briefs submitted to the department. On the basis of this allegation, the market agencies sought an order requiring the Secretary to submit to written interrogatories or to a cross-examination on the record. The United States Supreme Court held that the district court was in error in dismissing the allegation and that the market agencies had a right to question the Secretary on whether or not a proper hearing was granted. Chief Justice Hughes flatly stated that *"The one who decides must hear;"* but, seemingly as an after thought, added the following qualification:

> "This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evi-

61. Note, *Aftermath of Morgan Decisions* (1940), 25 IOWA L. REV. 622, 632.
62. 304 U.S. 333 (1938).
63. NOTE, *supra*, note 61, at p. 634.

> dence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense."

This opinion should be compared with *Local Government Board v. Arlidge*,[65] a leading English decision, wherein the House of Lords upheld an administrative determination against a contention that the agency had not heard the respondent before making its decision. The *Morgan* opinion distinguished this case on the ground that it related "to a different sort of administrative action"; although the only ascertainable difference was the dissimilarity between a proceeding before a board and one before an executive officer. Professor Sears has remarked that the *Morgan* case is an apparent repudiation of the *Arlidge* case "even though ostensibly (the court) stated that it was a horse of another color."[66]

The importance of the *Morgan* opinion can be appreciated only by an understanding that the sheer volume of work before an important agency makes it impossible and unpracticable for the agency heads to personally determine all controversies. As Professor Feller points out,[67]

> "The Secretary of Agriculture administers forty-two regulatory statutes, some of them, like the Soil Conservation and Domestic Allotment Act, of high national importance. Finally, he is a major political officer and takes part in the formulation of national policy as a member of the

64. Morgan v. United States, 298 U.S. 468 (1936).

65. (1915) A. C. 120, *rev'd* King v. Local Government Board (1914) 1 K. B. 160.

66. SEARS, *supra*, note 60, at p. 739.

67. Feller, *Prospectus for the Further Study of Federal Administrative Law* (1938), 47 YALE L. J. 647, 662

> Cabinet. If he were to give to every order which he signs the consideration which the *Morgan* case requires, he would probably have to devote all his time to the conduct of matters which must be considered petty from a national viewpoint."

Thus, it was feared that a strict adherence to the *Morgan* opinion would not only require a sharp break from existing departmental practices[68] but was liable to paralyze most of the large agencies.[69]

The state courts have never stated that "the one who decides must hear," but it has been held that the body charged with the duty of deciding a case "must consider the proof presented" and the determination cannot be based upon a report of the one who actually did the hearing. The court expressly refused to "undertake to say with what care and exactness the members of such a board must examine and consider the proofs in order to render a legally and factually sustainable judgment," but indicated that a determination must be reached "by means of well-known and clearly established rules of judicial procedure."[70]

The principle of the first *Morgan* case raises three main problems: (1) methods of proving that the record was not sufficiently considered; (2) how much of the record must be considered by the one making the decision; and (3) what are the substitutes for the required perusal of the record.[71]

(1) As has been noted,[72] the critical question in the *Morgan*

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68. Oppenheimer, *The Supreme Court and Administrative Law* (1937), 37 COL. L. REV. 1, 35.

69. BROWN, Symposium in the Association of American Law Schools Handbook (1938), at p. 225.

70. Chatham v. Board of Conservation and Development, 107 N.J.L. 101 (E. & A. 1930).

71. NOTE, *supra*, note 61, at p. 626.

72. *Comment* (1936), 36 COL. L. REV. 1156.

case was whether the plaintiff seeking to prove an allegation on information and belief was to be permitted to cross-examine the administrative official on a voluminous record and require him to answer written interrogatories, for in no other manner could the plaintiff be apprised of the failure of the official to read the record and "unless the plaintiff is permitted to make use of such devices he will have won a phyrric victory."[73]

With respect to the use of interrogatories, in only one of the cases which have arisen subsequent to the first *Morgan* opinion have they been authorized[74] and the force of that case has been greatly diminished.[75] In all of the other cases, the right of the parties to demand interrogatories has been denied.[76] One case, decided by the Third Circuit Court of Appeals, went so far as to hold that members of the National Labor Relations Board enjoyed the same privilege of secrecy of deliberation as has been extended to a jury.[77] Judge Clark stated that the issuance of interrogatories would cause a serious "evil of harassment" and "the function of deciding controversies might soon be overwhelmed by the duty of answering questions about them."[78]

Mr. Justice Frankfurter's recent opinion in the fourth *Morgan* case[79] demonstrates that even less success will be achieved

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73. *Id.*

74. National Labor Relations Board v. Cherry Cotton Mills, 98 F. (2d) 444 (C.C.A. 5th, 1938).

75. One of the important circumstances in the case was the fact that the Board had not provided the parties with an intermediate report to which they might take exception. The force of the decision therefore is diminished by the *Mackay* case, *supra*, note 62, which held that an intermediate report is not necessary in N.L.R.B. proceedings.

76. NOTE, *supra*, note 61, at p. 627.

77. National Labor Relations Board v. Botany Worsted Mills, Inc., 106 F. (2d) 263 (C.C.A. 3d, 1939).

78. FELLER, *supra*, note 67, p. 663.

79. *Supra*, note 58.

by attempts to utilize the devices of depositions and cross-examination. The facts as disclosed by the opinion indicate that over the government's objection the district court authorized the market agencies to take the deposition of the Secretary of Agriculture. The Secretary thereupon appeared in person at the trial and was questioned at length regarding the processes by which he reached the conclusions of his order, "including the manner and extent of his study of the record and his consultation with subordinates." This procedure was vigorously condemned:

> " * * * the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary 'has a quality resembling that of a judicial proceeding.' * * * Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that 'it was not the function of the court to probe the mental processes of the Secretary.' * * * Just as a judge cannot be subjected to such a scrutiny * * * so the integrity of the administrative process must be equally respected. * * * It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other."

(2) The courts have failed to set up any definite requirement as to how much of the record an administrative agency must consider in issuing an order,[80] though it seems fairly well established that it is not necessary to consider all of it.[81] The

80. NOTE, *supra*, note 61, at p. 628.

81. National Labor Relations Board v. Biles Coleman Lumber Co., 98 F. (2d) 16 (C.C.A. 9th, 1938).

opinion in the second *Morgan* case states that the Secretary "dipped into the record" and finds no fault in such a perusal. One circuit court has held that those deciding must "substantially master the record."[82] As before stated, in New Jersey, the only time the question was before the courts, the problem of the extent to which an agency must examine the proofs was left unanswered;[83] but, since it was stated that a determination must be reached by the means of "judicial procedure," the words of Judge Otis, in a lower court opinion in the *Morgan* litigation, are appropriate:

> "Let it be frankly stated now that the judges of this court, whose duty it was to consider the case *de novo* (since it involved constitutional issues), did not read all this testimony. We think, moreover, that it may be predicated with some assurance that all this testimony will not be read by the Justices of the Supreme Court when, as they must, they consider the cases on the merits."[84]

(3) Objections to administrative determinations on the ground that the administrative officials had not considered the records have been held obviated by the fact that the officials heard the parties in argument and thereby became apprised of the issues and the evidence.[85] And in the *Consolidated Edison case*,[86] it was held that where there was a transfer of the proceeding from a trial examiner to the board before an intermediate report was prepared, there was no lack of due process

82. National Labor Relations Board v. Cherry Cotton Mills, *supra*, note 74.
83. Chatham v. Board of Conservation and Development, *supra*, note 70.
84. Morgan v. U. S., 23 F. Supp. 380 (1937).
85. U. S. v. Standard Oil Co. of Cal., 20 F. Supp. 427 (D.C. Cal. 1937); Wisconsin Telephone Co. v. Public Service Commission, 287 N.W. 122 (Wisc. 1939).
86. Consolidated Edison Co. v. National Labor Relations Board, 59 Sup. Ct. 206 (1938).

even though there was no oral argument. Said the court, "Nor do we think the Board is bound to hear oral argument if it prefers to take a brief."

All things considered, the first *Morgan* case has lost all but a vestige of its efficacy and the importance of the case lies not in what it said but in what it did in stimulating interest in procedural problems in administrative law.

CLARK CRANE VOGEL.

Elizabeth, N. J.