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# Administrative Law -- Court Review of Agency Decision Under Statute -- Suit by Government Against Interstate Commerce Commission

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This issue contains notes by DAVID N. HENDERSON and GEORGE M. McDERMOTT, recent graduates of the University of North Carolina Law School.

*Publication of signed contributions from any source does not signify adoption of the views expressed by the LAW REVIEW or its editors collectively.*

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NOTES AND COMMENTS

**Administrative Law—Court Review of Agency Decision Under Statute—Suit by Government Against Interstate Commerce Commission**

The United States as a war-time shipper by complaint before the Interstate Commerce Commission sought recovery from certain railroads for their failure and refusal to provide wharfage and handling services

or an allowance in lieu thereof inasmuch as these charges were absorbed in the line-haul rates accorded private shippers and the same rates were exacted from the Government even though the Government had performed the services itself.<sup>1</sup> The Commission dismissed the Government's complaint whereupon the United States brought this action to set aside the order of the Commission.<sup>2</sup> Under the statute<sup>3</sup> suits to enjoin orders of the Commission are to be brought against the United States. The court, faced by this apparent disregard of the accepted rule that "No person may sue himself,"<sup>4</sup> found no case of controversy, refused to review the Commission order, and did not reach the merits of the case. The anomaly of the situation was manifest when the petition filed by the United States and the answer filed in its behalf were both signed by the same Assistant Attorney General. Under this holding the statute authorizing judicial review of orders of the Commission affords no review to the United States.

Once any person has acquired standing as a party in interest in proceedings before the Commission, he should have the right to appear as a party in any suit brought in court involving the validity of an order made by the Commission.<sup>5</sup> Even though the parties seeking review of a Commission order were not parties in the original proceedings before the Commission, they still may maintain a suit to enjoin, annul, or suspend a Commission order if they were "necessarily affected"<sup>6</sup> or "injuriously affected."<sup>7</sup> Under these criteria enunciated by the courts, though admittedly concerning private parties, it is evident that the United States is a proper party to seek judicial review of the Commission's orders; the United States was a party in the original proceedings and its interests were affected injuriously by the dismissal of its complaint.<sup>8</sup>

Here, however, we are faced with a statutory provision that "suits

<sup>1</sup> For the Commission's report and order, and two prior reports in the same proceeding, see *United States v. Aberdeen & R. R. R.*, 269 I. C. C. 141 (1947), 264 I. C. C. 683 (1946), 263 I. C. C. 303 (1945).

<sup>2</sup> *United States v. Interstate Commerce Comm'n*, 78 F. Supp. 580 (D. D. C. 1948); *probable jurisdiction noted mem.*, 69 Sup. Ct. 134 (1948).

<sup>3</sup> Pub. L. No. 773, 80th Cong., 2d Sess., §2322, §2324 (June 25, 1948); revising, 28 U. S. C. §46 (1946).

<sup>4</sup> *Globe & Rutgers Fire Ins. Co. v. Hines*, 273 F. 774 (C. C. A. 2d 1921).

<sup>5</sup> *McLean Lumber Co. v. United States*, 237 F. 460 (E. D. Tenn. 1916); *e.g.*, *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, 479 (1935); *Baltimore & O. R. R. v. United States*, 264 U. S. 258, 268 (1924).

<sup>6</sup> *Atlantic C. L. R. R. v. Interstate Commerce Comm'n*, 194 F. 449 (Com. C. 1911).

<sup>7</sup> *Diffenbaugh v. Interstate Commerce Comm'n*, 176 F. 409 (C. C. W. D. Mo. 1910).

<sup>8</sup> While the total reparations sought by the Government are not known, one of the original seven railroads against whom claims were filed made a compromise settlement during the proceedings before the Commission for approximately \$865,000.

to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States."<sup>9</sup> It has been held that in a suit to stay an order of the Commission, the United States is an indispensable party<sup>10</sup> and as such would be one without which the suit cannot proceed.<sup>11</sup> The statute, in effect, makes the United States and not the agency the party defendant and charges the Department of Justice with the duty of defending Commission orders in the courts.<sup>12</sup> Does this statute serve to place the Government outside the pale of judicial protection when it is the party complaining of the Commission action? Essentially, the situation would be unchanged if the agency itself were made liable to suit. The courts, however, apparently encounter no difficulty in suits wherein the United States or an agency thereof has sought relief from the actions of another agency of the Government; and the agency, not the Government, is the party defendant.

In *United States v. Public Utilities Commission*<sup>13</sup> the Government as a customer of a public utility company sought judicial review of agency action with reference to the reasonableness of utility rates. The court specifically recognized the problem herein involved and stated:

"The United States is seeking in this case, to establish its right to appeal—as a person or corporation affected—from an order of one of its own lesser creatures, an administrative agency."<sup>14</sup>

Nevertheless, the issue as to a suit between coordinate units of the Government was not raised and the review was afforded.

In *Interstate Commerce Commission v. Mechling*,<sup>15</sup> Mechling, the Inland Waterways Corporation and the Secretary of Agriculture brought suit to set aside the order of the Commission in the district court. The Commission argued that no right existed in the Government to bring suits against the Commission. The Supreme Court disposed of this argument with the terse statement, "We see no error in this."<sup>16</sup> The Government urged this precedent in the present case, but the court dis-

<sup>9</sup> Pub. L. No. 773, 80th Cong., 2d Sess., §2322, §2324 (June 25, 1948); revising, 28 U. S. C. §46 (1946).

<sup>10</sup> *Lambert Co. v. Baltimore & O. R. R.*, 258 U. S. 377 (1922).

<sup>11</sup> DOBIE, FEDERAL PROCEDURE §68 (1928).

<sup>12</sup> Other statutes providing that suits to enjoin, set aside, annul, or suspend agency orders shall be brought against the United States: COMMUNICATIONS ACT, OF 1934, 48 STAT. 926 (1934), as amended, 48 STAT. 1093 (1934), 50 STAT. 197 (1937), 47 U. S. C. §402 (1946); PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930, 46 STAT. 535 (1930), 7 U. S. C. §499k (1946); PACKERS AND STOCKYARDS ACT, 42 STAT. 168 (1921), 7 U. S. C. §217 (1946); EMERGENCY RAILROAD TRANSPORTATION ACT, 1933, Pub. L. No. 91, 73rd Cong., 1st Sess., §16 (June 16, 1933).

<sup>13</sup> 151 F. 2d 609 (App. D. C. 1945) (Public Utilities Commission of the District of Columbia, a federal agency).

<sup>14</sup> *Id.* at 610.

<sup>15</sup> 330 U. S. 567 (1947).

<sup>16</sup> *Id.* at 573.

tinguished the facts and pointed out that the Secretary of Agriculture was specifically authorized by statute to seek judicial relief. "Consequently [the court concluded], it was not a case in which the United States was both plaintiff and defendant."<sup>17</sup> It is submitted that the specific statutory authorization to sue does not change the *Governmental* character of the Secretary of Agriculture as a party litigant. If the court desired to draw a distinction between the Secretary of Agriculture as an agent of the Government in the performance of Governmental functions and his principal, the United States, the distinction in denomination is without difference in effect.<sup>18</sup>

In *McLean Trucking Co. v. United States*,<sup>19</sup> the Secretary of Agriculture joined with the trucking company in a court action to set aside an order of the Interstate Commerce Commission granting an application for the merger and consolidation of certain trucking lines.<sup>20</sup> The Court, however, did not mention the propriety of the suit but decided the case on its merits. A comparable situation arose in *Interstate Commerce Commission v. Jersey City*<sup>21</sup> wherein the Economic Stabilization Director was allowed to oppose a Commission order raising railroad fares in Jersey City. The Court again did not question the appropriateness of the parties in the litigation.

Cases such as *Defense Supplies Corporation v. United Lines Co.*<sup>22</sup> relied on by the court in the principal case have no relevancy here. If the decision therein sought had been rendered, it would have resulted in a loss of funds on the part of one Governmental agency for the benefit, not of a private party, but of another Governmental agency. The problem was essentially one of internal management which could have been remedied by executive action. In the principal case the Government is deprived of its remedy against parties with whom it has no connection, and the Government as an entity is to be wholly deprived of the funds sought by its claim for reparations.

If the court in the principal case seeks to draw a distinction between

<sup>17</sup> *United States v. Interstate Commerce Comm'n*, 78 F. Supp. 580, 583 (1948).

<sup>18</sup> *Cf. Defense Supplies Corp. v. United States Lines Co.*, 148 F. 2d 311 (C. C. A. 2d 1945), *cert. denied*, 326 U. S. 746 (1945).

"The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered." *Minnesota v. Hitchcock*, 185 U. S. 373, 387 (1902); *accord*, *Louisiana v. McAdoo*, 234 U. S. 627 (1914); *Boeing Air Transport, Inc. v. Farley*, 75 F. 2d 765 (App. D. C. 1935). Courts will now look behind the designation of parties on the record and seek to determine who are real parties to litigation. *Mine Safety Appliance Co. v. Knox*, 59 F. Supp. 733 (D. D. C. 1945).

<sup>19</sup> 321 U. S. 67 (1943).

<sup>20</sup> The Anti-Trust Division of the Department of Justice had opposed the action sought to be enjoined in the proceedings before the Commission.

<sup>21</sup> 322 U. S. 503 (1944).

<sup>22</sup> 148 F. 2d 311 (C. C. A. 2d 1945), *cert. denied*, 326 U. S. 746 (1945).

suits against an agency and those against the United States because the agency attorneys would handle the defense in the first instance whereas the Department of Justice would be charged with the responsibility in the second instance, the distinction is fruitless. In practice the Department of Justice has on occasion admitted the allegations made by plaintiffs regarding defects in the Commission's orders whereupon the Commission has taken up the defense and the litigation has proceeded to a conclusion.<sup>23</sup> In other instances the Department of Justice has failed to take part in litigation due to conflicting allegations by coordinate agencies of the Government and the Commission has continued the suit to its final determination.<sup>24</sup>

Section 9 of the INTERSTATE COMMERCE ACT provides that any person or persons claiming to be damaged may either make complaint to the Commission or bring suit in any district court of competent jurisdiction.<sup>25</sup> If the result of this decision prevails upon appeal, the Government in similar cases will be obliged to choose the alternative remedy provided by the statute and bring suit against the individual carrier in the district court instead of litigating before the Commission unless it is willing to forego its right to contest the initial decision. Thus, if the Government is relegated to the use of the federal courts for the adjudication of its claims, it will be deprived of the expert technical ability of the Commission.

It is submitted that the interest of the Commission as defended by the United States is not that of a party litigant which stands to gain or lose by the outcome of the suit. While it is true that the Commission has an interest in the integrity of its orders, the court's decision would in no manner result in the imposition on the Commission of pecuniary liability. The individual railroads, in the final analysis, are the actual parties to be pecuniarily affected by the present decision. The fact that the Commission has been the trial tribunal should not result in one of the parties in interest before it being precluded from contesting the suit.

Once the Interstate Commerce Commission has ruled on a case coming before it, there remains only the course pursued by the Government

<sup>23</sup> *Interstate Commerce Comm'n v. Mechling*, 330 U. S. 567 (1947) (United States admitted allegations of complaint in district court, whereupon I. C. C. intervened and defended the order.); *McLean Trucking Co. v. United States*, 321 U. S. 67 (1943) (United States confessed error before district court and I. C. C. defended.).

<sup>24</sup> *Interstate Commerce Comm'n v. Jersey City*, 322 U. S. 503 (1944) (United States was named a defendant but filed a neutral answer because two Government agencies were in opposition to each other.); *Interstate Commerce Comm'n v. Inland Waterways Corp.*, 319 U. S. 671 (1943) (Attorney General did not participate, giving as his reason the existence of a conflict in litigation between coordinate agencies of the Government, the A. A. A. and the I. C. C.).

<sup>25</sup> 24 STAT. 382 (1887), as amended, 36 STAT. 1167 (1911), 49 STAT. 543 (1935), 49 U. S. C. §9 (1946).

in the principal case to enjoin the Commission's order.<sup>26</sup> This means that the Government is without remedy in its present action whereas the railroads in a Commission ruling adverse to their interests would have been able to have brought the case before the district court for review of the Commission ruling.<sup>27</sup>

"The Government is always at liberty . . . to avail itself of all the remedies which the law allows to every person, natural or artificial, for the vindication and assertion of its rights."<sup>28</sup> And yet the decision in the principal case provides a judicial cloak behind which private interests may seek immunity from judicial review sought by the Government of decisions favorable to those private interests.

ROBERT D. LARSEN.

### Automobiles—Repurchase Option Contracts—Enforceability Thereof

To combat the practice of quick resale to a "used car" lot, where today's demand permits new motor vehicles to be sold far above their original price, many dealers have employed a repurchase option contract. These provide that, if during the life of the agreement (usually six months) the purchaser wishes to sell the car, he will give the first refusal to the dealer for a fixed or determinable price. In addition, some contracts stipulate that for failure to perform, a certain sum shall be paid as liquidated damages.

In any suit to enforce such a contract the defense that the law does not favor restrictions deterring the sale of chattels must be met. But in light of the present situation in the automobile market, there should be a strong public policy in favor of these contracts as a device for cutting the price of "used cars" by accelerating delivery to legitimate purchasers.

Another problem present in all these contracts is that of consideration. The contract states that it is a part of the consideration for the sale of the car, and this interpretation has been upheld.<sup>1</sup> A close analogy to the contracts in questions may be found in similar transactions relating to corporate stock. In such a situation the Massachusetts court<sup>2</sup> said that the consideration was the purchase price plus the agreement to offer the

<sup>26</sup> *Lambert Co. v. Baltimore & O. R. R.*, 258 U. S. 377 (1922); *North Dakota v. Chicago & N. W. Ry.*, 257 U. S. 485, 490 (1922) ("Complete justice requires that the railroads not be subjected to the risk of two irreconcilable commands—that of the I. C. C. enforced by a decree on the one side and that of this court on the other.").

<sup>27</sup> *Cf. United States v. Griffin*, 303 U. S. 226 (1938).

<sup>28</sup> *United States v. Lee*, 106 U. S. 196, 222 (1882).

<sup>1</sup> *Schuler v. Dearing Chevrolet Co.*, 76 Ga. App. 570, 46 S. E. 2d 611 (1948).

<sup>2</sup> *New England Trust Co. v. Abbott*, 162 Mass. 148, 38 N. E. 432 (1894).