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PUBLIC UTILITIES — JUDICIAL REVIEW OF THE RATE BASE — The Secretary of Agriculture made an order fixing the rates chargeable by the appellant, the rate base being determined by the cost of reproduction new less depreciation. The district court held that, since by congressional act the findings of fact of the Secretary were made conclusive, the court could not make an independent determination of the value but was bound to take the Secretary's valuation if there was substantial evidence to support it. However, the court then went on to review the evidence before the Secretary and concluded that the appellant had failed to show that the valuation was "clearly and convincingly wrong." *Held*, that the ruling of the district court¹ was erroneous in so far as it denied the duty to make an independent judicial determination of fact on a constitutional issue of confiscation, but since the district court had actually reviewed the evidence² and made an independent decision, it was not reversible error. It was further held that the appellant had failed to show that the rates set would result in confiscation of its property, and consequently that the order should be affirmed. Three judges concurred in the result, but dissented from the ruling as to the conclusiveness of the Secretary's finding of value. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 56 S. Ct. 720 (1936).

In *Ohio Valley Water Co. v. Ben Avon Borough*³ it was held that when a constitutional issue of confiscation of property under the due process clause of the Fourteenth Amendment is raised, the state must provide an opportunity for an independent judicial determination both of the law and of the facts.⁴ This principle had been previously stated in regard to actions of federal tribunals in

¹ *St. Joseph Stock Yards Co. v. United States*, (D. C. Mo. 1935) 11 F. Supp. 322.

² 11 F. Supp. 322 at 333.

³ 253 U. S. 287, 40 S. Ct. 527 (1920).

⁴ The case was severely criticized at the time: Curtis, "Judicial Review of Commission," 34 HARV. L. REV. 862 (1921); Freund, "The Right to a Judicial Review in Rate Controversies," 27 W. VA. L. Q. 207 (1921); and see DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW 195 et seq. (1927). That this criticism is not wholly gone is evidenced by the strong dissent in the principal case. 298 U. S. 38 at 73. The gist of this criticism is the excessive burden on the courts, and the impracticality of taking such technical problems away from highly trained tribunals and transferring them to the courts merely by an allegation of confiscation. It is submitted that the practical justification for the rule lies in the impartiality which the Court can bring to the problem, especially in reviewing the orders of a state commission, and in the check on the rule noted *infra*, note 6. See also Buchanan, "The Ohio Valley Company Case and the Valuation of Railroads," 40 HARV. L. REV. 1033 (1927).

Manufacturer's Railway v. United States; ⁵ and it was here fully re-examined and upheld. The issue of confiscation is raised simply by an allegation thereof, and thereupon the federal court must examine all of the pertinent evidence. Nevertheless, there is a strong *prima facie* presumption in favor of the correctness of the findings of the tribunal, and to that end the appellant has the burden of proving that the rates as set will amount to a confiscation of its property.⁶ When there is no constitutional question raised, the court will take the facts as found by the tribunal as conclusive unless they may be said to be jurisdictional.⁷ The recent Supreme Court case of *West v. Chesapeake & Potomac Tel. Co.*⁸ has provided an additional cause for overthrowing the order of the tribunal; when the method of fixing the rate base is so erroneous as to be arbitrary and the Court can say that there was no evidence on which to base the finding of value. The Court refused to make an independent valuation of the property on a correct basis to determine whether the rates as fixed were confiscatory or not. In the principal case the method of valuation was the cost of reproduction new less depreciation, a method which had been allowed in a period of relatively stable price levels where there was no definite upward or downward trend.⁹ However, under depression circumstances the Court has quite clearly frowned upon that method¹⁰ and returned to the "formula" of *Smyth v. Ames*.¹¹ The appellant here did not contest the method of valuation, but it may be questioned whether this error (if it be error) was so fundamental as necessarily to involve unjust and inaccurate results, within the rule of the *West* case. If the rule of that case is to be followed in the

⁵ 246 U. S. 457, 38 S. Ct. 383 (1918).

⁶ *Darnell v. Edwards*, 244 U. S. 564, 37 S. Ct. 701 (1917); *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U. S. 287 at 305, 53 S. Ct. 637 (1933), where it is said, "but the judicial function does not go beyond the decision of the constitutional question. That question is whether the rates as fixed are confiscatory. And upon that question the complainant has the burden of proof, and the Court may not interfere with the exercise of the State's authority unless confiscation is clearly established"; *Lindheimer v. Illinois Bell Telephone Co.*, 292 U. S. 151, 54 S. Ct. 658 (1934); *Dayton Power & Light Co. v. Public Utilities Comm. of Ohio*, 292 U. S. 290, 54 S. Ct. 647 (1934).

⁷ *Crowell v. Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932), noted in 46 HARV. L. REV. 478 (1933). The note points out the difficulty in determining whether the rule is based on the due process clause or Article III of the Constitution, and the consequent problem of whether the same rule will be applied to state agencies.

⁸ 295 U. S. 662, 55 S. Ct. 894 (1935), noted in 34 MICH. L. REV. 100 (1935).

⁹ *McCardle v. Indianapolis Water Co.*, 272 U. S. 400, 47 S. Ct. 144 (1926).

¹⁰ *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U. S. 287, 53 S. Ct. 637 (1933).

¹¹ 169 U. S. 466 at 546-547, 18 S. Ct. 418 (1898): "in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. . . ."

future, there is still a problem as to where the dividing line is to be drawn between a method of valuation which is inherently erroneous and arbitrary, and one which may or may not reach a result which is confiscatory.¹²

D.D.

¹² Perhaps the only statement concerning a correct method of valuation which can be made with certainty is that the value must be the *present* value of the utility's property, thus definitely discarding the "capital prudently invested" theory set forth by Brandeis in *Southwestern Bell Telephone Co. v. Public Service Comm. of Missouri*, 262 U. S. 276 at 289 ff., 43 S. Ct. 544 (1923). For a discussion of the various methods of valuation, see Goddard, "The Evolution and Devolution of Public Utility Law," 32 MICH. L. REV. 577 at 591 ff. (1934); Goddard, "The Evolution of the Cost of Reproduction as the Rate Base," 41 HARV. L. REV. 564 (1928); Beutel, "Valuation as a Requirement of Due Process of Law in Rate Cases," 43 HARV. L. REV. 1249 (1930).