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ADMINISTRATIVE LAW-THE CHOICE OF REMEDY-MODIFICATION OF ADMINISTRATIVE ORDER BY COURT

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RECENT DECISIONS

ADMINISTRATIVE LAW—THE CHOICE OF REMEDY—MODIFICATION OF ADMINISTRATIVE ORDER BY COURT—The Federal Trade Commission in proceedings under section 5 of the Federal Trade Commission Act [1] found, inter alia, that petitioner, a manufacturer of overcoats, used a deceptive and misleading trade name, Alpacuna, which induced the erroneous belief that its coats contained vicuna.[2] The commission issued a cease and desist order [3] banning the use of the word Alpacuna to describe petitioner's coats. The circuit court of appeals [4] found that the commission's findings were supported by substantial evidence, but felt that the remedy was unduly harsh because of the fact that the public interest could have been adequately protected by using qualifying language. The court indicated that it would have modified the order under the doctrine of *Federal Trade Commission v. Royal Milling Co.*,[5] but it thought subsequent decisions involving other administrative agencies had limited the right of the court to modify the remedy prescribed in an order of the commission, and that the control of the remedy lay exclusively with the commission. *Held*, Congress by the Federal Trade Commission Act has not limited the reviewing court to an affirmance or reversal but has given the court power to modify an order,[6] and this power extends to the remedy prescribed by the commission as *Federal Trade Commission v. Royal Milling Co.* indicated. It was further held that, as in the case of orders of other administrative agencies under comparable statutes, judicial review of Trade Commission orders was limited, and with respect to the remedy, it extends no further than to ascertain if the commission in making its choice of the remedy has exceeded reasonable limits. The commission is the expert body empowered to determine what remedy is necessary to elimi-

[1] 52 Stat. L. 111, §5 (1938), 15 U.S.C. (1940) §45.

[2] Petitioner's coat consisted of cloth containing Alpaca, mohair, and wool fibers on a cotton backing. It sold for forty dollars. Vicuna is a rare animal found in the high mountains of Peru; overcoats from its fiber run as high as nine hundred dollars. Petitioner claimed the trade name Alpacuna was selected because the cloth contained Alpaca, the suffix "una" was added partly in order to obtain a word that was easy to pronounce. See Jacob Siegel Co. v. Federal Trade Commission, (C.C.A. 3d, 1944) 150 F. (2d) 751; also Wool Products Labeling Act, 54 Stat. L. 1128, §2 (1940), 15 U.S.C. (1940) §68.

[3] In the Matter of Jacob Siegel Co., 36 F.T.C. 563 (1943), 8 FED. REG. 6016 (1943).

[4] (C.C.A. 3d, 1944) 150 F. (2d) 751.

[5] 288 U.S. 212, 53 S.Ct. 335 (1933).

[6] 52 Stat. L. 111, §5(c) (1938), 15 U.S.C. (1940) §45(c): ". . . the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. . . ." For examples of the use of this language in other acts see, National Labor Relations Act, 49 Stat. L. 453, §10 (1935), 29 U.S.C. (1940) §160(f); Federal Power Act, 49 Stat. L. 860, §313 (1935), 16 U.S.C. (1940), §825l(b); Securities Act of 1933, 48 Stat. L. 80, §9, 15 U.S.C. (1940) §77i Civil Aeronautics Act, 52 Stat. L. 973 at 1024, §1006(d) (1938), 49 U.S.C. (1940) §646(d).

nate the unfair or deceptive trade practice, and the court will not interfere except where the remedy selected has no reasonable relation to the unlawful practice. Since the commission in the present case has not considered whether the ends of the act could be satisfied, and the trade name saved by the use of qualifying language, and since its expert opinion is entitled to great weight, the court will not pass on the question of whether the limits of discretion have been exceeded until the commission has made the above determination. *Jacob Siegel Co. v. Federal Trade Commission,* (U.S. 1946) 66 S.Ct. 758.

The limitation on the right of a court to modify the remedy prescribed by the Federal Trade Commission was first laid down by Judge Learned Hand in *Herzfeld v. Federal Trade Commission,*[7] where he said that the Supreme Court, in decisions concerning the labor board,[8] "has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts." [9] This decision was cited in a number of opinions [10] in the circuit courts and was quoted by the lower court in the principal case.[11] In order to obtain the benefit of administrative expertness the courts have devised rules of self-limitation.[12] Courts created under Article III of the Federal Constitution may not review administrative [13] or legislative [14] acts unless these acts are arbitrary or beyond the agency's scope of authority. The wisdom or expediency of the action is left to administrative judgment.[15] In judicial matters, with the possible exception [16] of jurisdic-

[7] (C.C.A. 2d, 1944) 140 F.(2d) 207.

[8] International Association of Machinists v. National Labor Relations Board, 311 U.S. 72, 61 S.Ct. 83 (1940); Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 61 S.Ct. 845 (1941); Virginia Electric Co. v. National Labor Relations Board, 319 U.S. 533, 63 S.Ct. 1214 (1943).

[9] Herzfeld v. Federal Trade Commission, (C.C.A. 2d, 1944) 140 F.(2d) 207 at 209.

[10] American Power and Light Co. v. Securities Exchange Commission, (C.C.A. 1st, 1944) 141 F. (2d) 606; Parke, Austin and Lipscomb, Inc. v. Federal Trade Commission, (C.C.A. 2d, 1944) 142 F. (2d) 437; Charles of the Ritz Dist. Corp. v. Federal Trade Commission, (C.C.A. 2d, 1944) 143 F. (2d) 676; Gelb v. Federal Trade Commission, (C.C.A. 2d, 1944) 144 F. (2d) 580; A.P.W. Paper Co., Inc. v. Federal Trade Commission, (C.C.A. 2d, 1945) 149 F. (2d) 424; Deer v. Federal Trade Commission, (C.C.A. 2d, 1945) 152 F. (2d) 65; National Labor Relations Board v. American Laundry Machinery Co., (C.C.A. 2d, 1945) 152 F. (2d) 400.

[11] (C.C.A. 3d, 1944) 150 F. (2d) 751 at 755.

[12] UHLER, REVIEW OF ADMINISTRATIVE ACTS, Michigan Legal Studies, 68 (1942).

[13] Helvering v. Rankin, 295 U.S. 123, 55 S.Ct. 732 (1935); Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326 (1941).

[14] Keller v. Potomac Electric Co., 261 U.S. 428, 43 S.Ct. 445 (1923); Federal Radio Commission v. General Electric Co., 281 U.S. 464, 50 S.Ct. 389 (1930).

[15] FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 87 (1941); National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 63 S.Ct. 997 (1943).

[16] See the oil proration cases, Railroad Commission of Texas v. Rowan and Nichols Oil Company, 310 U.S. 573, 60 S.Ct. 1021 (1940); Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098 (1942).

tional and constitutional facts,[17] courts will not disturb administrative findings if supported by substantial evidence.[18] In the field of interpretation of law the court is no longer absolute.[19] In line with the *Keller* and *Federal Radio Commission* cases [20] modification of an administrative remedy might be called legislative rather than judicial because of the relation of remedy to policy,[21] but the lawmaking of the commission has been said to flow from adjudication.[22] Conceding this to be the case, the expert body qualified to decide the question of law should be the court,[23] but the decisions of administrative tribunals are entitled to great weight.[24] The principal case while limiting the doctrine of the *Herzfeld* case indicates that full opportunity will be given to the administrative tribunal to select the remedy, and the court will not modify it unless the agency acted arbitrarily or capriciously. It is of interest to note that the recently enacted Federal Administrative Procedure Act [25] contains no provision granting the right to modify the remedy, and the Model State Administrative Procedure Act [26] provides for modification only under conditions which preclude the substitution of the court's remedy for that of the administrative tribunal.

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[17] Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527 (1920); Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285 (1932); St. Joseph Stock Yards v. United States, 298 U.S. 38, 56 S.Ct. 720 (1936).

[18] On the subject of limitations of judicial review of facts see Stason, "'Substantial Evidence' in Administrative Law," 89 UNIV. PA. L. REV. 1026 (1941); Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206 (1938).

[19] 44 MICH. L. REV. 797 (1946).

[20] See note 14.

[21] Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177 at 194, 61 S.Ct. 845 (1941).

[22] LANDIS, THE ADMINISTRATIVE PROCESS 150 (1938).

[23] McDermott, "To What Extent Should the Decisions of Administrative Bodies Be Reviewable by the Courts?" 25 A.B.A.J. 453 (1939); LANDIS, THE ADMINISTRATIVE PROCESS 152 (1938). *Contra*, Hart, "Judicial Review of Administrative Action: A Thesis," 9 GEO. WASH. L. REV. 499 (1941).

[24] Principal case at 761; Medo Photo Supply Corp. v. National Labor Relations Board, 321 U.S. 678, 64 S.Ct. 830 (1944); Federal Trade Commission v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 54 S.Ct. 423 (1934).

[25] S. 7, §10(e), June 11, 1946 (Public No. 404).

[26] Prepared and approved by the National Conference of Commissioners on Uniform State Laws, approved September 9, 1944.