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ADMINISTRATIVE LAW-EXHAUSTION OF ADMINISTRATIVE REMEDIES AS A PREREQUISITE TO JUDICIAL REVIEW-DISCRETIONARY TREATMENT BY FEDERAL COURTS

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COMMENTS

ADMINISTRATIVE LAW—EXHAUSTION OF ADMINISTRATIVE REMEDIES AS A PREREQUISITE TO JUDICIAL REVIEW—DISCRETIONARY TREATMENT BY FEDERAL COURTS—The recent Supreme Court decision in *Levers v. Anderson* held that the rule that one must exhaust his administrative remedies before he is entitled to judicial review does not operate automatically so as to preclude judicial relief when such relief has been expressly permitted by statute.[1] Stated in this way, it is difficult to see how one could reach a different conclusion. Nevertheless, it is believed that this decision, which resulted in a reversal of a circuit court's judgment,[2] did much to remove certain confusion in this field.

The lower tribunal based its decision upon the widely-accepted principle that a court will not review a party's grievances until he has

[1] (U.S. 1945) 66 S. Ct. 72.

[2] Levers v. Anderson, (C.C.A. 10th 1945) 147 F. (2d) 547.

first exhausted his administrative remedies.[3] Although this doctrine did not receive general recognition until 1908,[4] actually the courts of equity employed the principle many years before that, treating it as a phase of the doctrine that a suit in equity will not lie where there is an adequate remedy at law.[5] Under this treatment, the exhaustion of administrative remedies quite naturally became a condition precedent to the power of the courts to entertain any suit.[6] However, as the creation of administrative boards of review became more and more popular with both Congress and the legislatures,[7] some of the courts discovered that the exhaustion doctrine was at least an extension of the equity rule if not a complete departure from it. The United States Supreme Court has applied the doctrine to cases at law,[8] and other courts have held that even in equity the doctrine is sometimes applicable where there would not be deemed to be an adequate remedy at law.[9]

Preparing the way for what some day may be a complete break from the equity rule, the courts have assembled logical support for the exhaustion doctrine on its own merits. They have approved it as a matter of comity between the administrative and judicial branches of the

[3] Id. at 548. For other cases stating the doctrine, see Myers v. Bethlehem Shipbuilding Corp., Ltd., 303 U.S. 41 at 50, 58 S. Ct. 459 (1938); Apartments Building Co. v. Smiley, (C.C.A. 8th, 1929) 32 F. (2d) 142 at 143; Abelleira v. District Court of Appeal, 17 Cal. (2d) 280 at 291, 109 P. (2d) 942 (1941).

[4] Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S. Ct. 67 (1908). Some writers believe this case marked the beginning of the doctrine. See Lilienthal, "Federal Courts and State Regulation of Public Utilities," 43 HARV. L. REV. 379 at 385 (1930); 51 HARV. L. REV. 1251 at 1261 (1938). But this in turn has been denied. See Berger, "Exhaustion of Administrative Remedies," 48 YALE L. J. 981 (1939).

[5] Douglas County v. Stone, (C.C. Va. 1901) 110 F. 812 at 815; New York and Chicago Grain and Stock Exchange v. Gleason, 121 Ill. 502 at 512, 13 N.E. 204 (1887); Wilson v. Green, 135 N.C. 343 at 346, 47 S.E. 469 (1904); West Portland Park v. Kelly, 29 Ore. 412 at 420, 45 P. 901 (1896).

[6] An adequate remedy at law precludes equity jurisdiction. Standard Oil Co. of Ky. v. Atlantic Coast Line Railroad Co., (D.C. Ky. 1926) 13 F. (2d) 633 at 635; Hay v. White, 201 Ind. 425 at 429, 169 N.E. 332 (1930); McDonald v. Johnston, 218 Iowa 1352, 256 N.W. 676 (1934); 30 C.J.S., Equity, § 20.

[7] The growth of administrative law has been enormous during the last half century and especially since 1933. See Stason, "Study and Research in Administrative Law," 7 GEO. WASH. L. REV. 684 at 688 (1939). Today, a state such as Illinois may have as many as 150 different administrative boards. See Fisher, "Judicial Review of Administrative Orders," 7 JOHN MARSHALL L. Q. 254 at 255 (1941).

[8] See First National Bank v. Board of Weld County Commissioners, 264 U.S. 450 at 455, 44 S. Ct. 385 (1923); Anniston Mfg. Co. v. Davis, 301 U.S. 337 at 343, 57 S. Ct. 816 (1937); Myers v. Bethlehem Shipbuilding Corp., Ltd., 303 U.S. 41 at 51, note 9, 58 S. Ct. 459 (1937).

[9] De Pauw University v. Brunk, (D.C. Mo. 1931) 53 F. (2d) 647 at 652, affd. 285 U.S. 527, 52 S.Ct. 405 (1932); San Joaquin and King's River Canal and Irrigation Co. v. Stanislaus, 155 Cal. 21 at 27, 99 P. 365 (1908); See also Bashore v. Brown, 108 Ohio St. 18 at 23, 140 N.E. 489 (1923).

government[10] and as a means of maintaining an orderly procedure in settling controversies.[11] Accordingly, it has been felt advisable to give the administrative boards a chance to correct their own errors;[12] especially in cases of a technical nature requiring the expert knowledge available in an administrative agency.[13] Some jurists have emphasized the advantage of the rule to the courts themselves and have employed it to bring about a filtering process and prevent an overloading of the judicial dockets.[14]

These developments in the doctrine may very well have been the cause for the past uncertainties as to its effect. If the doctrine were still analagous to the rule that a suit in equity will not lie where there is an adequate remedy at law, it would seem logical that an exhaustion of administrative remedies should still have been necessary to give the court jurisdiction.[15] However, if the exhaustion doctrine could now be considered apart from the equity rule from which it sprang and could be supported independently on principles of comity and orderliness of procedure, it might be argued that its exercise should lie within the discretion of the courts.[16] The tendency in the federal courts has been

[10] Prentis v. Atlantic Coast Line Co., 211 U.S. 210 at 229, 29 S. Ct. 67 (1908); Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196 at 203, 44 S. Ct. 553 (1924); Railroad & Warehouse Commission of Minn. v. Duluth Street Ry. Co., 273 U.S. 625 at 628, 47 S. Ct. 489 (1927). To permit interference with administrative proceedings would destroy the effectiveness of the administrative body. Abelleira v. District Court of Appeal, 17 Cal. (2d) 280 at 293, 109 P. (2d) 942 (1941).

[11] United States v. Sing Tuck, 194 U.S. 161 at 168, 24 S. Ct. 621 (1904); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 at 209, 49 S. Ct. 282 (1929); St. Clair Borough v. Tamaqua & Pottsville Electric Ry. Co., 259 Pa. 462 at 468, 103 A. 287 (1918).

[12] Natural Gas Pipeline Co. of America v. Slattery, 302 U.S. 300 at 311, 58 S. Ct. 199 (1937). To hold otherwise would be in effect to substitute the determination of the court for the determination which Congress intended should be made by the Commission. Red River Broadcasting Co., Inc. v. Federal Communications Commission, (App. D.C. 1938) 98 F. (2d) 282 at 287.

[13] People v. Walsh, 203 App. Div. 468 at 474, 196 N.Y.S. 672 (1922); Earl Carroll Realty Corp. v. New York Edison Co., 141 Misc. 266 at 272, 252 N.Y.S. 538 (1931). See also Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285 at 291, 42 S. Ct. 477 (1922).

[14] United States v. Sing Tuck, 194 U.S. 161 at 170, 24 S. Ct. 621 (1904); Federal Trade Commission v. Claire Furnace Co., 274 U.S. 160 at 174, 47 S. Ct. 553 (1927); People v. Keith Railway Equipment Co., (Cal. App. 1945) 161 P. (2d) 244.

[15] See supra, note 4.

[16] Comity determines not how a case shall be decided but how it may with propriety be decided. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485 at 488, 20 S. Ct. 708 (1900). "Comity concedes and allows, but does not withhold or prohibit." Stowe v. Belfast Savings Bank, (C.C. Me. 1897) 92 F. 90 at 96. Rules intended to further orderly procedure of the court do not have the force of substantive law, and whether the courts will deviate from them is a matter of discretion. See Elsom v. Tefft, 148 Wash. 195 at 196, 268 P. 177 (1928). See also Pacific Finance Corp. v. Elli-

to depart from the old equity rule and follow this discretionary approach. The first important indication of this came early in the development of the doctrine when, in *Prentis v. Atlantic Coast Line Company*, the Supreme Court declared that it was "...a question of equitable fitness or propriety, and must be answered on the particular facts."[17] Accordingly, the federal courts have used their discretion to dispense with the rule when it appeared that further pursuance of administrative remedies would be futile,[18] when only questions of law remained to be settled,[19] and when both the complainant and the government waived their rights to have the controversy brought before the board.[20]

Although the discretionary treatment has been approved repeatedly,[21] it can hardly be said that the language has been unequivocal in every case in which the doctrine has been applied. On the contrary, there have been so many Supreme Court opinions rendered in recent years which apparently followed the mandatory theory that the authorities have been unable to agree as to what is the accepted rule.[22]

thorpe, 134 Ore. 601 at 603, 280 P. 658, 289 P. 1085 (1930); Mitchell v. Rushing, 55 Tex. Civ. App. 281 at 288, 118 S.W. 582 (1909).

[17] 211 U.S. 210 at 229, 29 S. Ct. 67 (1908).

[18] Prendergast v. New York Telephone Co., 262 U.S. 43 at 48-49, 43 S. Ct. 466 (1923); National Bank of Billings v. Yellowstone County, 276 U.S. 499, 48 S. Ct. 331 (1928); City Bank Farmers' Trust Co. v. Schnader, 291 U.S. 24 at 34, 54 S. Ct. 259 (1934). But futility does not automatically cause a suspension of the doctrine. Occasionally the courts have felt it advisable to ignore this factor. See First National Bank v. Board of Weld County Commissioners, 264 U.S. 450, 44 S. Ct. 385 (1923); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 at 616-17, 57 S. Ct. 549 (1937); Red River Broadcasting Co. v. Federal Communications Commission, (App. D.C. 1938) 98 F. (2d) 282 at 288, cert. den. 305 U.S. 625, 59 S. Ct. 86.

[19] Hollis v. Kutz, 255 U.S. 452 at 454, 41 S. Ct. 371 (1921); Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285, 42 S. Ct. 477 (1922); Hirsh v. Block, (App. D.C. 1920) 267 F. 614; Stout v. Pratt, (D.C. Mo. 1935) 12 F. Supp. 864, affd. (C.C.A. 8th, 1936) 85 F. (2d) 172. But on occasions the court has seen fit to demand an exhaustion of administrative remedies even when the basis of controversy lies in the interpretation and application of the Constitution. See Porter v. Investors Syndicate, 286 U.S. 461, 52 S. Ct. 617 (1932).

[20] Tucker v. Alexander, 275 U.S. 228, 48 S. Ct. 45 (1927); Domenech v. Verges, (C.C.A. 1st, 1934) 69 F. (2d) 714. But in Utah Fuel Co. v. National Bituminous Coal Commission, (App. D.C. 1938) 101 F. (2d) 426 at 428, the matter was treated as a "jurisdictional question" and waiver held impossible.

[21] United States v. Abilene & Southern Ry. Co., 265 U.S. 274 at 280-282, 44 S. Ct. 565 (1924); Banton v. Belt Line Ry. Corp., 268 U.S. 413 at 416-17, 45 S. Ct. 534 (1925); Pennsylvania v. Williams, 294 U.S. 176 at 182-183, 55 S. Ct. 380 (1935); Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 at 311, 58 S. Ct. 199 (1937); Hollis v. Kutz, 255 U.S. 452 at 454, 41 S. Ct. 371 (1921).

[22] "... it is still not entirely clear whether application of the rule rests within the discretion of the court or is non-discretionary." Berger, "Exhaustion of Administrative Remedies," 48 YALE L. J. 981 at 986 (1939); "The authorities are not in accord." 42 AM. JUR., Public Administrative Law, § 199. One federal court has felt that the general treatment is non-discretionary. See Red River Broadcasting Co. v. Federal

While it is true that many of the decisions enunciate the exhaustion doctrine without referring to possible discretionary treatment, it is not safe to infer from that alone that the rule is not applied with discretion. In fact, a close study of the "mandatory" cases shows that in most instances the court actually gave a good deal of attention to the equities of each case before denying relief, which would seem to have been entirely superfluous if the rule had truly limited the court's power rather than being applicable merely at its discretion.[23] Many of the decisions which appear to treat the doctrine as non-discretionary deal with matters which, by their very nature, would make a failure of the court to apply the doctrine an abuse of discretion.[24] It is believed that such cases need not be deemed support for the mandatory treatment, but might better be treated merely as instances where discretion weighed extremely heavily for employment of the doctrine.

In tax cases, for example, the Supreme Court has felt that a judicial interference with the administrative process might "derange the operations of the government and thereby cause serious detriment to the public." [25] It has also been pointed out that courts cannot always give proper relief in such disputes since they have no power to substitute new tax assessments.[26] It may be these considerations rather than the

Communications Commission, (App. D.C. 1938) 98 F. (2d) 282 at 284. California has gone as far as to say, "the rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion." Abelleira v. District Court of Appeal, 17 Cal. (2d) 280 at 293, 109 P. (2d) 942. (1941).

[23] Typical of the "mandatory" cases is Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S. Ct. 215 (1926), in which the court summarily applied the doctrine, but not before noting, "Nor was there anything . . . which placed him in a more favorable attitude . . ." (Id. at 123-124). See also Petersen Baking Co. v. Bryan, 290 U.S. 570 at 575, 54 S. Ct. 277 (1934), and cases cited infra, note 26. Similar decisions are to be found in state reports. See, for instance, Oklahoma Public Welfare Commission v. State, 187 Okla. 654, 105 P. (2d) 547 (1940), where the court approved the contention that the doctrine was non-discretionary and then gave considerable attention to whether or not appeal would be fruitless in this instance.

[24] Even in the federal courts, where the departure from the mandatory equity rule has probably been greater than anywhere else, the latitude of discretion open to the lower tribunals has not been broad, and there have been several reversals on the ground of abuse of discretion. See Pennsylvania v. Williams, 294 U.S. 176 at 185, 55 S. Ct. 380 (1935); Illinois Commerce Commission v. Thomson, 318 U.S. 675 at 686, 63 S. Ct. 834 (1943); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 at 207, 49 S. Ct. 282 (1929). Sometimes these reversals seem to be interpreted as if they followed the non-discretionary rule. See Nelson v. First National Bank of Sioux City, (C.C.A. 8th, 1930) 42 F. (2d) 30 at 31.

[25] Pittsburgh, C., C. & St. L. Ry. Co. v. Board of Public Works, 172 U.S. 32 at 38, 19 S. Ct. 90 (1898).

[26] Id. at 39; State Railroad Tax Cases, 92 U.S. 575 at 614-615 (1875). For a detailed discussion of the tendency to prevent the taxpayer from complaining before the courts, see Stason, "Judicial Review of Tax Errors—Effect of Failure to Resort to Administrative Remedies," 28 MICH. L. REV. 637 (1930).

theory that the exhaustion doctrine is mandatory that has influenced some of the opinions to go so far as to say in tax cases that an exhaustion of administrative remedies is a "prerequisite" to judicial jurisdiction[27] and that a party is "not entitled" to resort to the courts until that condition has been met.[28]

Similarly, there are found impelling reasons for generally denying federal judicial relief before state administrative procedure has been completely followed. "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it."[29] It is not surprising to find that this high regard for state comity has caused the courts to declare that a party "must" exhaust his administrative remedies[30] and that he is "not entitled" to judicial relief until he does.[31] As in the tax cases, such language may merely reflect the strong equities involved rather than constitute non-discretionary treatment of the exhaustion doctrine.[32]

[27] First National Bank v. Board of Weld County Commissioners, 264 U.S. 450 at 455, 44 S. Ct. 385 (1924).

[28] Gorham Mfg. Co. v. State Tax Commission of New York, 266 U.S. 265 at 270, 45 S. Ct. 80 (1924). But even many of the tax cases which use mandatory language show that in reality discretion was used. Thus, in Bradley v. City of Richmond, the court said the plaintiff was "not warranted" to resort to the courts, but later the possibility of futility was considered. 227 U.S. 477 at 485, 33 S. Ct. 318 (1912). In First National Bank v. Harrison County, the court said, "unquestionably, all adequate administrative remedies must be exhausted before resort can be had to the courts." But it went on to say, "No 'peculiar facts' . . . appear so as to relieve appellants of their duty to exhaust administrative remedies." (C.C.A. 8th, 1932) 57 F. (2d) 56 at 58, cert. den. 287 U.S. 611, 53 S. Ct. 13. Similarly, in Hammerstrom v. Toy National Bank of Sioux City, the court called the exhaustion of administrative remedies an "indispensible prerequisite" but qualified the statement by adding, "under the circumstances existing in the case at bar." (C.C.A. 8th, 1936) 81 F. (2d) 628 at 637.

[29] Matthews v. Rodgers, 284 U.S. 521 at 525, 52 S. Ct. 217 (1932). But once the administrative procedure has been completed, the federal courts will not respect the procedure of appeal set out by statute, for that could be letting the legislators limit the scope of federal court jurisdiction. See Palmolive Co. v. Conway, (D.C. Wis. 1930) 37 F. (2d) 114.

[30] See Apartments Building Co. v. Smiley, (C.C.A. 8th, 1929) 32 F. (2d) 142 at 143.

[31] See Vandalia Railroad Co. v. Public Service Commission of Indiana, 242 U.S. 255 at 260-261, 37 S. Ct. 93 (1916). For other cases involving state comity, see Albertville National Bank v. Marshall County, (C.C.A. 5th, 1934) 71 F. (2d) 848; J. B. Schermerhorn, Inc. v. Holloman, (C.C.A. 10th, 1934) 74 F. (2d) 265; Columbia Terminals Co. v. Lambert, (D.C. Mo. 1939) 30 F. Supp. 28.

[32] This interpretation is supported by City of El Paso v. Texas Cities Gas Co., in which the court said, "This disinclination [of federal authority to interfere in State matters until State remedies have been exhausted] is founded in comity, rather than on

One more group of cases should be considered. Many of the modern statutes which authorize administrative acts and set up administrative boards to review those acts also expressly or impliedly set down the conditions under which an appeal may be taken to the courts.[33] It would seem that the exhaustion doctrine would have no application in cases involving such statutes, since their provisions conferring or denying jurisdiction to the courts not only are mandatory in themselves, but also are controlling over any rules of procedure.[34] Nevertheless, our federal courts appear to have applied the doctrine frequently in such cases, treating it as if it were non-discretionary in order to give full effect to the intent of Congress.[35] Because of this unusual application of the doctrine, it hardly seems appropriate to cite such cases as authority for mandatory treatment in cases where statutes are not involved. Indeed, it might be argued that even in such cases the courts have treated the doctrine as discretionary, and regard the statute as a peculiar circumstance rendering failure to employ the doctrine an abuse of their discretion.[36]

Perhaps the most influential of these "statute" cases was *Myers v.*

a want of power. . . ." (C.C.A. 5th, 1938) 100 F. (2d) 501 at 503. Even in the Vandalia case [242 U.S. 255, 37 S. Ct. 93 (1916)] the court considered all contentions except one before applying the doctrine.

[33] See, for example, Federal Power Act, 41 Stat. L. 1063 (1920), as amended 49 Stat. L. 803 at 860, § 313a (1935), 16 U.S.C. (1940) § 825b; Securities Exchange Act of 1934, 48 Stat. L. 881 at 901, § 25 (1934), 15 U.S.C. (1940) § 78y; National Labor Relations Act of 1935, 49 Stat. L. 449 at 453, §§ 10(a), 10(f), 29 U.S.C. (1940) §§ 160(a), 160(f); Public Utility Act of 1935, 49 Stat. L. 803 at 834, § 24 (1935), 15 U.S.C. (1940) § 79x; Federal Alcohol Administration Act, 49 Stat. L. 977 at 980, § 4(h) (1935), 27 U.S.C. (1940) § 204(h).

[34] Alaska Packers Assn. v. Pillsbury, 301 U.S. 174, 57 S. Ct. 682 (1937); Woodbury v. Andrew Jergens Co., (C.C.A. 2d, 1932) 61 F. (2d) 736; McMahon v. Hamilton, 202 Cal. 319, 260 P. 793 (1927); Bank of Beaverton v. Godwin, 124 Ore. 166, 264 P. 356 (1928); 27 COL. L. REV. 450 at 452 (1927).

[35] See United States v. Illinois Central Railroad Co., 291 U.S. 457 at 462 and 463, 54 S. Ct. 471 (1934); Myers v. Bethlehem Shipbuilding Corp., Ltd., 303 U.S. 41 at 48, 50, 58 S. Ct. 459 (1938); Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375 at 384-385, 58 S. Ct. 963 (1938); United States v. Kauten, (C.C.A. 2d, 1943) 133 F. (2d) 703; International Brotherhood of Teamsters v. International Union of Brewery Workers, (C.C.A. 9th, 1939) 106 F. (2d) 871 at 876; United Electrical Radio-Machine Workers of America v. International Brotherhood of Electrical Workers, (D.C. N.Y. 1940) 30 F. Supp. 927 at 929. Similarly, see Amalgamated Assn. of St. Electric Ry. & Motor Coach Employees v. McDowell, (Tex. Civ. App. 1941) 150 S.W. (2d) 866 at 868, 869.

[36] In Levers v. Anderson, the Supreme Court seemed to treat the statute, which granted rather than denied jurisdiction to the courts, as a circumstance calling for discretionary treatment that would not defeat the provisions of the act. 66 S. Ct. 72 at 73 (1945). If the exhaustion doctrine is applicable to such "statute" cases, it appears that an abuse of discretion can arise from the employment of the doctrine as well as from the failure to employ it.

Bethlehem Shipbuilding Corporation, in which the court held that it was ". . . the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[37] The court went further in this case than in others by amplifying its statement with a footnote which explained that ". . . the rule is one of judicial administration—not merely a rule governing the exercise of discretion. . . ."[38] While these declarations were neither so clear nor so forceful as they might have been, they have been treated as in direct opposition to the discretionary approach; and it was partly on the basis of this case that the lower court in *Levers v. Anderson* concluded that the petitioner would have to exhaust the administrative remedies made available to him in spite of the statutory permit to take an immediate appeal to the courts.[39]

In reviewing this latter case on certiorari, however, the Supreme Court removed this apparent conflict with the discretionary approach. In interpreting the rule enunciated in the Myers case, the Court explained that "this rule does not automatically require that judicial review must always be denied where rehearing is authorized but not sought."[40] With this the Court seems to have refuted any mandatory implications which might have been drawn from the *Myers* case.

If it is proper to go behind the language used by the courts to determine the true treatment given the doctrine, it is believed that the vast majority of cases will be found to support the discretionary approach; and, although we can still look for many cases to come up in the future whose peculiar facts will influence the courts to summarily apply the exhaustion doctrine, there seems to remain little doubt but that hereafter the federal courts are expected to use this principle with discretion.

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[37] Myers v. Bethlehem Shipbuilding Corp., Ltd., 303 U.S. 41 at 50, 58 S. Ct. 459 (1938). This was one of the clearest examples of a "statute" case, for this principle was enunciated by the court just after it had concluded that ". . . Congress declared the Board exclusively should hear and determine in the first instance." Id. at 50.

[38] Id. at 51, note 9.

[39] The court did not rely directly upon the Myers case, but it cited decisions [(C.C.A. 10th, 1945) 147 F. (2d) 547 at 548] which in turn did make reference to it.

[40] (U.S. 1945) 66 S. Ct. 72 at 73.