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Primary Jurisdiction and Exhaustion of Administrative Remedies

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PRIMARY JURISDICTION AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

The concepts of primary jurisdiction and exhaustion of administrative remedies lie at the very heart of the administrative process. Both of these concepts have in large part been judicially evolved.

PRIMARY JURISDICTION

The primary jurisdiction doctrine determines whether administrative and judicial jurisdiction are concurrent, or whether the initial decisions must be made by the administrative agency.[1] This problem ordinarily arises in a context in which conceivably both the courts and an agency have jurisdiction as distinguished from a situation in which the statute clearly places exclusive original jurisdiction in the agency, as for example, licensing statutes. A legislative enactment in such instances gives an administrative commission exclusive jurisdiction over the subject matter.[2]

The father of the theory is *Texas & Pacific Railroad Co. v. Abilene Cotton Co.*[3] which held that although the Interstate Commerce Act provided that the administrative remedies set out therein were to be in addition to judicial remedies, the initial determination was to be made exclusively by the Commission. Action is initiated in a court, and the court is then confronted with the question of whether to apply this doctrine of primary and exclusive jurisditcion. Of course, Constitutional questions are subject to review by the Supreme Court, despite action by the administrative body as a result of the application of the doctrine.

Several tests have been applied by state and federal courts to make the doctrine more definitive. Mr. Justice Brandeis stated it should be applied when the "enquiry is essentially one of fact and discretion in technical matters."[4] Brandeis suggested in the *Merchants Elevator* case, that when the ruling depends solely upon non-technical judicial determination typically made by a court, the court will not apply the doctrine.

When a private agreement is required by law to conform to the rules and regulations of an agency, it is necessary that the agency determine its validity according to those rules before a judicial opinion may be sought on the question of its legality.[5] Such exclusive jurisdiction must be enforced in order adequately to develop standards which are fair to the public, create uniformity, fully utilize the expertise of the agency, and thoroughly process and consider each case. The courts should not have the right or burden of establishing the policies of administrative programs.

1. Davis, Administrative Law, § 197 (1951).
2. Peter Fox Brewing Co. v. Sohio Petroleum Co., 189 F. Supp. 743 (Ill. D.C. 1960).
3. Tex. & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1922).
4. Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922).
5. Thompson v. Texas-Mexican R. Co., 328 U.S. 570, 66 S.Ct. 937, 90 L.Ed. 1132 (1946).

With the idea of allowing the Commission the right to interject its policy into all the phases of a dispute, the courts have rendered decisions that have, in effect, departed from the Brandeis thinking that a question of law may initially be decided by a court. The rationale is that the question of law should first go to the agency if it is better prepared to answer it, especially if the purpose is to invoke agency policy.[6] However, the agency decision is not final, as the court may on judicial review substitute its judgment on a question of law for that of the agency.[7]

When a litigant seeks the aid of a court without first resorting to the agency, the result of the application of the doctrine of primary jurisdiction is the dismissal of the case[8] rather than a stay of the proceedings.

Wyoming, in contrast with the federal and national view, has followed the theory of concurrent jurisdiction in at least one area. Either the court or the agency is recognized as being initially capbale of handling a water adjudication proceeding. *Simmons v. Ramsbottom,*[10] held that the right of the Board of Control to adjudicate water rights of contending parties in individual cases is not exclusive, but that such rights may be adjudicated by the courts in cases in which that has not been done by the Board of Control. The decision is predicated upon the omission of an explicit expression of the intention of the Legislature to make the jurisdiction exclusive. Without such expressed intent the jurisdiction in equity was considered to exist concurrently with that of the Commissioners.

There were, however, some practical and historical reasons for refusing to apply the doctrine of primary jurisdiction in the case of water adjudication and it does not follow that the Constitution intended to give The Board exclusive jurisdiction, for when the Board was created, it was confronted with many difficulties. Few adjudications of priorities had been made by the courts. The work load that confronted the Board was mountainous. The Legislature in some instances made limited appropriations so that years elapsed before the Board was able to make even a small percentage of the adjudications that were necessary. Therefore, the courts determined that concurrent jurisdiction was necessary in order to fully consider and promptly decide these cases.

The *Simmons'* court found that adjudication was an incident of administration proceedings; however, it stated that under the Wyoming Constitution a court may always be resorted to for the purpose of answering questions of law where concurrent jurisdiction is otherwise feasible.[11]

6. Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 78 S.Ct. 851, 2 L.Ed.2d 926 (1958).
7. Federal Maritime Board v. Isbrandtsen Co., supra at 498.
8. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951).
9. General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361 (1940).
10. Simmons v. Ramsbottom, 51 Wyo. 419, 68 P.2d 153 (1937).
11. Simmons v. Ramsbottom, supra.

From this it may be deduced that the courts as well as the agency may initally answer questions of law which corresponds with Justice Brandeis' theory.

Laramie Rivers Co. v. LeVasseur[12] reaffirms the Simmons' rule as to concurrent jurisdiction of courts to decide water rights and on whether the doctrine applies to questions of law.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Complementing the theory of primary jurisdiction is that of exhaustion of administrative remedies: there may be no judicial relief for an injury until the prescribed administrative remedies have been exhausted. The leading federal case is *Meyers v. Bethlehem Shipbuilding Corp.*,[13] in which the corporation filed a bill in equity to enjoin a hearing on an unfair labor practice charges made against the company before the N.L.R.B. The Supreme Court ruled that since the corporation had not exhausted its remedies before the N.L.R.B., injunction would not lie.

The foremost exception to the exhaustion rule is a finding of a clear lack of agency jurisdiction over the problem at hand, particularly in the area of federal vs. state jurisdiction. A condition precedent to the claim of this exception is the allegation that exhaustion will involve irreparable injury to the petitioner. *Public Utilities Commission v. United Fuel Gas Co.*[14] establishes the test that if there is a *clear* lack of jurisdiction and the petitioner will suffer irreparable harm from the exhaustion, the exhaustion doctrine will not be applied. In the *United Fuel* case there was a plain lack of jurisdiction in the state agency, due to federal pre-emption of gas rates.

An alternative to the condition precedent of irreparable harm is that termed "inadequacy of administrative remedies." In *Smith v. Ill. Bell Tel. Co.*,[15] the agency had allowed a question of proper rates to lie dormant for years. This delay in ousting "confiscatory rates" was considered by the court as rendering the administrative remedy inadequate; hence, the court allowed equitable relief. Thus, a petitioner does not have to wait indefinitely for agency action on a pending application.

A further exception to the exhaustion rule is that if the legislation, i.e., the enabling statute, is challenged as being clearly unconstitutional, the exhaustion doctrine may not be applied. A Wyoming case, *State v. Hull*,[16] applies this reasoning. "Exhaustion" in this case included a review by the state courts by certiorari as part of the administrative procedure. The Wyoming Supreme Court held that exhaustion was not required, be-

12. Laramie Rivers Co. v. LeVasseur, 65 Wyo. 414, 202 P.2d 680 (1949).
13. Myers v. Bethlehem Shipbuilding Corp.,303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).
14. Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U.S. 456, 63 S.Ct. 369, 87 L.Ed. 396 (1943).
15. Smith v. Ill. Bell Tel. Co., 270 U.S. 587, 46 S.Ct. 408, 70 L.Ed. 747 (1926).
16. State v. Hull, 65 Wyo. 251, 199 P.2d 832 (1948).

cause the proper remedy to test the constitutionality of a zoning ordinance is mandamus not certiorari. The court said that despite the fact that the question of constiutionality could have been reviewed by the court on administrative appeal, ". . . the general rule requiring exhaustion of statutory remedy is not an absolute one, and must give way where justice requires it."

The theory of the doctrine of exhaustion of administrative remedies was applied by the U.S. Supreme Court at the administrative level in *Hillsborough v. Cromwell,*[17] in which a taxpayer had a constitutional issue resolved without exhausting state administrative remedies. The reasoning was that the Commission cannot make the ultimate decision. (Contra reasoning is logical: a litigant may win at the board level, so there is no need for a decision on constitutional issues.)

A further question is whether a court of review violates the exhaustion doctrine when it considers an issue that is not raised before the Commission. In exceptional cases, to obtain an equitable result, courts will consider issues that are not raised at board level.[18]

New Jersey uniquely has adopted the exception to the exhaustion rule that where only an error of law by the agency is involved, the court may decide that it can be judicially settled without requiring exhaustion of agency remedies. A plaintiff claimed that the denial by a building inspector of his application to use a building as a hotel was arbitary and unreasonable. The court held: "Where appeal to an intermediate body would be futile gesture, it is not required, since reasonable speed is still an essential part of substantial justice."[19]

Whether an application for rehearing at the administrative level is essential to exhaust agency remedies is dependent upon the statute involved. When the statute makes rehearing mandatory, the exhaustion doctrine may be extended through a rehearing before the judicial review will become available.[20]

Section 10 of the Federal Administrative Procedure Act[21] is exemplary of a statute that dispenses with the necessity of applying for a rehearing, as it states that agency action will be final whether or not any application has been made for "reconsideration." So after the decision the petitioner is not required to apply for rehearing but may if a statute permits.[22]

A Wyoming case, *Hamilton Pipe Co. v. Stanolind,*[23] held that the rehearing application is optional with the petitioner. Wyo. Stat. § 37-40 (1957) states: "At any time after an order has been made by the Commis-

17. Hillsborough Tp. Somerset County v. Cromwell, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946).
18. Hormel v. Helvering, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941).
19. Honigfeld v. Byrnes, 14 N.J. 600, 103 A.2d 598 (1954).
20. French v. Industrial Commission, 85 Colo. 173, 274 Pac. 742 (1929).
21. 5 U.S.C. § 1009.
22. Levers v. Anderson, 326 U.S. 219, 66 S.Ct. 72, 90 L.Ed. 26 (1945).
23. Hamilton v. Stanolind Pipe Co., 65 Wyo. 350, 202 P.2d 184 (1948).

sion any person interested may apply for a rehearing in respect to any matter determined therein." The court interpreted this as a permissive statute that the word "may" "operates to confer discretion."

The last category is the statute that is silent on the subject of rehearing. The majority view as indicated by a Louisiana case is that such a statute does not demand a rehearing in order to satisfy the exhaustion doctrine.[24] As to a second rehearing when one rehearing is required under the exhaustion doctrine, the better view (unless there is a reversal of the first award which allows the aggrieved party a choice of a second rehearing or judicial review) is that only one rehearing is required.[25]

At present no Wyoming statutes directly refer to the doctrines of primary jurisdiction and exhaustion; however, Wyo. Stat. § 37-50 (1957) and Wyo. Stat. § 15-62 (1957) imply that interlocutory relief is available as an exception to the doctrine of exhaustion of administrative remedies in the form of an injunction upon application to the district court to prevent a stay while appeal continues if the existing situation would cause imminent peril to life or property.

THE PROBLEMS OF PRIMARY JURISDICTION AND EXHAUSTION AS AFFECTED BY THE ADMINISTRATIVE PROCEDURE ACT AND THE MODEL STATE ADMINISTRATIVE PROCEDURE ACT

The doctrine of primary jurisdiction has evolved primarily from interpretations by the judiciary although Wyoming predicates its application on specific legislative intent. No direct mention of primary jurisdiction is made by the Administrative Procedure Act or the Model State Act. Section 10 (c) of the Administrative Procedure Act[26] incorporates exhaustion doctrine thinking when it provides that preliminary action, e.g., an examiner's initial decision, will not be final action by the agency.

The Colorado Act[27] raises the issue of exhaustion by specifically mentioning the exception in Section 5 (4): "Upon a finding that irreparable injury would otherwise result, the agency, upon application therefor, shall postpone the effective date of the agency action pending judicial review, . . ." It goes on to specify that an injunction may be granted when there is projected an irreparable injury and the proposed agency action is beyond its constitutional or statutory jurisdiction.

Section 15 of the Revised Model State Administrative Act[28] makes the applicable statement that, "Any preliminary, procedural, or intermediate agency act or ruling is immediately reviewable in any case in which review of the final agency decision would not provide an adequate remedy."

24. Hunter v. Hussey, 90 So.2d 429 (La. 1956).
25. Dalsheim v. Industrial Accident Commission, 215 Cal. 107, 8 P.2d 840 (1932).
26. Administrative Procedure Act supra.
27. Colo. Rev. Stat. § 3-16-4 (5), 1960 Cum. Supp.
28. State Administrative Procedure Act (fourth draft), 9c U.L.A. 174.

SUMMARY AND CONCLUSIONS

a. While it is true that the doctrine of primary jurisdiction is judge-made, Wyoming would profit from a statute that requires initial action be brought at the administrative level for the purpose of determining questions of fact and mixed questions of law and fact. As it stands, there is some precedent in Wyoming for concurrent jurisdiction between the courts and the agencies. This is unsatisfactory, as it may result in unnecessary, costly litigation which may be a burden on the courts and deprive the participants and the courts the benefit of the expertise of the agency and uniform policies.

b. A line should be drawn as to when the doctrine of exhaustion of administrative remedies should be strictly enforced. The Colorado Act serves as a good model in reference to a projected irreparable injury and clear lack of jurisdiction along with the question of constitutionality of the state statute as criteria. In such situations a provision for injunctive relief against agency action should be allowed. Finally, it should be stipulated by statute that there may be petition for court determination if irreparable damage would be caused by unreasonable delay in the administrative proceedings.

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