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# Notice and Opportunity to Be Heard

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One is tempted to be critical of laws—and of those who make them—when the confusion in administrative practice and procedure is brought into focus. But this and the accompanying materials can be of greatest service to the lawyer and citizen simply by attesting to the present need for reform. Other jurisdictions [3] have led the way out of similar conditions. The success and benefits of standardizing administrative procedure in such jurisdictions are overdue in Colorado.

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# NOTICE AND OPPORTUNITY TO BE HEARD

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When considering the problem of notice and opportunity to be heard in rule making sessions of administrative agencies, a preliminary determination must be made of whether the hearing is, in reality, a legislative or a *quasi* judicial hearing.

A *quasi* judicial hearing must be preceded by notice and affected parties must be afforded an opportunity to be heard. On the other hand, in the absence of a statutory requirement, it is not necessary to give notice to affected parties in a *quasi* legislative hearing. "And it [an Administrative Agency] is no more required to give previous notice of an intent to make a regulation or to grant a hearing on the merits of the regulation to be adopted than is the legislature in exercising its lawmaking functions." [1] The determination of whether a hearing is *quasi* judicial or *quasi* legislative is of primary importance. To fail to give notice and opportunity to be heard in *quasi* judicial hearings would be fatal error and ground for vacating any determination made at this hearing. On the other hand, a hearing *quasi* legislative in character requires no notice.

As a general statement, it may safely be said that in hearings which are *quasi* judicial in nature the findings go to a particular activity in the past. In addition, they are of specific applicability. "Adjudication is the imposition of a specific duty *in personam*, or of a liability, or the granting of a right or status which is dependent on a previous right or duty determined to exist or to have existed, or by way of redress or punishment for its violation." [2] It is immediately seen that there is a necessity for notice and opportunity to be heard. Where an agency is to investigate the activities of a particular individual or group of individuals and the result of the hearing is going to be of specific applicability to

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[3] Federal Administrative Procedure Act, Public Law No. 404, 79th Congress; *Administrative Procedure Act—Legislative History*, Senate Document No. 278, 79th Congress; "A Symposium on State Administrative Procedure", 33 *Iowa L. Rev.*, 372, (1948); Heady, F., *Administrative Procedure Legislation in the States* (1952).

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[1] Morgan v. U. S., 298 U. S. 468.

[2] Morgan v. U. S., 304 U. S. 1, 82.

this or these individuals, the idea of fair play dictates that they should have an opportunity to rebut the evidence against them. An exhaustive analysis of the right to notice and opportunity to be heard in *quasi* judicial determinations may be found elsewhere in this issue of *Dicta.*

*Distinctions Between Legislative and Judicial Functions*

The *quasi* legislative function of administrative agencies is of a different character than the *quasi* judicial function. This aspect of an agency's function is generally considered to be of general applicability and of future effect. The language of the courts vary, but courts use these terms in one way or another. For example: "One if the factors adverted to by the courts in distinguishing legislative from judicial action is the element of futurity in the first and retrospection in the latter." [3] While rules or regulations may be formulated as a result of conditions known to exist, and while actions which may violate these rules will be subject to censure in the future, rules are not promulgated to censure the past activities. "Legislation, it is said, is the creation by the state of a right (including an authority, a privilege, or an immunity) duty or status not dependent on the existence of a previous right, duty, or status." [4] Another aspect of the futurity of legislative functions is presented by *Ohio Valley Water Co. v. Ben Avon*:[5] "Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The second part of this statement brings us to the second major distinction between *quasi* legislative and *quasi* judicial functions. This is the general applicability of the former and the specific applicability of the latter. If any hearing is to determine an application to a specific person or persons falling within an arbitrarily drawn class (that is, a class which is not a real or distinct class based on real differences), then the agency is acting in its *quasi* judicial capacity. If, on the other hand, the application is to all persons or a real class (distinguished on reasonable differences), then the agency is performing a *quasi* legislative function. "Legislative and judicial functions have been distinguished by the element of generality in the former and particularity in the latter, that is, legislation operates against a class, and judgments against individuals." [6] There is a valid reason for this distinction. Where a person's rights are to be determined in a hearing, he must have every opportunity to protect these rights. There is no problem involved in allowing him to be present and listening to his arguments on the case. Where a great many persons are involved, it is usually not feasible to provide all concerned with notice. Further,

[3] Mitchell Coal and Coke Co. v. Penn. R. Co., 230 U. S. 247.
[4] 115 A. L. R. 39, n. 3.
[5] 253 U. S. 287.
[6] San Diego Land and Town Co. v. Jasper, 189 U. S. 439.

those who are responsible to the legislature (the agencies) are going to lend an ear to the demands of fair treatment from a large group. They are going to take cognizance of the views of a large body of voters whereas they are not going to be so concerned with the views of a single voter. The individual must then, of practical necessity, be protected by a requirement of notice and opportunity to be heard.

We have seen, then, *quasi* legislative and *quasi* judicial functions are distinguished on two grounds: the general applicability of the former as against the specific of the latter. " . . . legislation operates against a class and judgments against individuals";[7] and the futurity of the former as against the retrospectivity of the latter, "Legislative power is the power to make, alter, or repeal law[8] or rules for the future."[9] "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."[10]

*Colorado Court Failed to Recognize Distinction*

In 1941 the Colorado Supreme Court decided the case of *Smith Brothers Cleaners and Dyers v. People.*[11] In that case the defendant was charged with selling its services at less than the established minimum prices, paying its employees less than the minimum wages, and requiring its employees to work in excess of the established maximum number of hours. Smith Brothers claimed that the act was unconstitutional in that it violated Sections 3 and 25 of Article II of the Colorado Constitution and Section I of the Fourteenth Amendment to the Federal Constitution. In effect Smith Brothers claimed that no notice and opportunity to be heard was given in the hearing to fix prices, as required by the due process clause. The Colorado Supreme Court held that the Act was a proper exercise of the police power, and as far as the substantive law was involved the requirements of due process were satisfied. But then the court fell into error for it held Section 7 of the Act unconstitutional because it contained no provision requiring notice and opportunity to be heard.

As said previously, if the application is to all persons or a real class and concerns future effect, the act is *quasi* legislative.

The pertinent section of the Act says:

> To make investigations and surveys in this State relative to determining the fair and reasonable average cost for performing the various services regularly performed by cleaning and dyeing establishments; to submit all findings together with a schedule of minimum retail and wholesale prices based upon such fair and reasonable average costs to the Industrial Commission for approval,

[7] *Id.*
[8] Spingir v. Philippine Islands, 277 U. S. 189.
[9] Mitchell Coal and Coke Co. v. Penn. R. Co., *supra.*
[10] Prentis v. Atlantic Coast Line Co., 211 U. S. 210.
[11] 108 Colo. 449, 119 P. 2d 623.

> and, when approved, said minimum retail and wholesale prices shall be binding on every member of the trade within this State, in that no member of the trade shall sell or offer to sell any of the services included in such minimum price schedule at a price which is lower than the fair and reasonable average cost as established and approved in the minimum price schedule.[12]

As previously seen, no notice and opportunity to be heard is necessary to satisfy the requirements of due process in *quasi* legislative hearings.[13] It is necessary then to ascertain whether the hearing setting a minimum price in the *Smith Brothers* case is *quasi* legislative or *quasi* judicial in nature. Logical reasoning avails of no answer, except that the hearing setting the price for cleaners and dyers in Colorado was legislative in nature, and contrary to the opinion of the Colorado Supreme Court, required no notice and opportunity to be heard. Analyzing the *Smith Brothers* case in light of the case of *Morgan v. U. S. (supra)* there is no pre-existing duty nor is there an imposition of a liability because of a pre-existing duty. The hearing determined the duty of a whole class. That is, there was no specific application, but rather, a general one. There was, further, no determination of specific past actions. No cleaning and dying establishment was being censured for violation of a past duty (see *Prentiss v. Atlantic Coast Line Co., supra)*. The hearing was creating a new duty to affect only the future (see *Ohio Valley Water Co. v. Ben Avon, supra)*. The hearing in Smith Brothers was only *quasi* legislative and, as such, required no notice or opportunity to be heard.

In considering this problem, however, one is not forced to rely on only logical analysis. This is ample precedent to sustain this position. The case relied on by the court in reaching their decision was *Brown v. City of Denver*.[14] The decision in that case was correct, but improperly relied upon.

The case of *Brown v. City of Denver* is readily distinguishable from *Smith Brothers Cleaners and Dyers* case. In the *Brown* case, the city council passed an ordinance requiring all property owners to build a sidewalk of certain specifications within sixty days. In default of their so doing, an authorized contractor was to build a sidewalk and the city engineer was then to determine the reasonable cost thereof and to levy a special assessment in this amount as a fixed charge against the property. This action of the engineer was a *quasi* judicial function. It was applied against specific persons (Those who failed to build sidewalks) and was predicated on past violation of the law which required property owners to build sidewalks. The court did not hold that notice should be given before the rules were made, but only before the judicial hearing making the fixed charge. In so holding the court said:

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[12] Sec. 7, ¶3 (e) (1), 1937 S. L., p. 425.
[13] Morgan v. U. S., 298 U. S. 468.
[14] 7 Colo. 305, 3 P. 455.

> Until the walk is built and a certificate therefor issued . . . the owner cannot know the grounds of complaint . . . In so far, therefore, as the ordinance provides for making the cost of construction a special assessment against the property improved, and for the manner of collecting the same without notice or hearing, we are of the opinion that it is . . . invalid.

The court here implies that the special assessment is judicial in nature because of the specific applicability, and the assessment may become final only after a judicial determination. The *Smith Brothers* case may be readily distinguished from such an attempt to create a liability on the basis of an already existing duty. The regulation in the *Smith Brothers* case merely created a new duty. The case of *Brown v. City of Denver*, in actuality, stands for the proposition that notice and opportunity to be heard in *quasi* judicial hearings is necessary. *Brown v. City of Denver* then, is not authority for the stand taken in the *Smith Brothers* case.

*Price Fixing As Legislative Function*

The Colorado Supreme Court has placed an impossible burden upon state agencies by its decision in the *Smith Brothers* case. The Federal District Court of Virginia said, in upholding a milk price fixing act:

> The act contains no directions as to the kind of notice to be given and evidently merely contemplated notice by advertisement to the general public. No other notice was feasible, considering the large number of persons engaged in production and distribution of milk.[15]

In another milk price fixing case, the New Jersey court said:[16]

> In the absence of a specific constitutional or statutory requirement thereof, notice of proceedings before the subordinate body exercising, as here, the administrative function is not requisite to valid action by that body. Nor is a hearing required in the absence of a provision therefor in the organic or statutory law. The due process clause of the Fourteenth Amendment imposes no such requirement. . . .

In upholding a minimum wage order, the Washington court said:[17]

> The legislature instead of fixing the minimum wage and the conditions of labor for women and minors as it would clearly have the right to without any notice whatever to persons affected thereby, has authorized a commission to examine into and determine the facts upon which the Act may become operative. This we are satisfied, may be done without any notice unless notice is required by the Act governing the Commission.

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[15] Highland Farms Dairy v. Agnew, 16 Fed. Supp. 575.

[16] State Board of Milk Control v. Newark Milk Co., 118 N. J. Eq. 504, 179 A. 116.

[17] Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 P. 595.

It thus seems that the holding of the Colorado Supreme Court in the *Smith Brothers* case was unfortunate because price fixing is clearly a *quasi* legislative function [18] and, as such, no notice and opportunity to be heard are necessary.

As the United States Supreme Court said in *Bi-Metallic Co. v. Colorado*:[19]

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or on assembly of the whole. . . . There must be a limit to individual argument in such matters if government is to go on.

# USE OF EVIDENCE IN HEARINGS BEFORE COLORADO ADMINISTRATIVE AGENCIES

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It is hardly necessary to call attention to the confusion which exists with regard to the application of technical rules of evidence to hearings had before the myriad administrative bodies which have been created in Colorado. In proceedings before the various boards, commissions, and agencies there is no homogeneous or even similar procedure to be followed with regard to the exclusionary rules of evidence. Some of the larger and better known agencies, such as the Public Utilities Commission and the Industrial Commission, are governed by rather comprehensive statutory requirements which have become well defined by subsequent rules adopted by these commissions themselves as well as by custom and prior experience.

Because the list of administrative agencies is continually growing, the frequency of litigation before these bodies is increasing at a corresponding rate. Adding to that fact the common knowledge that our society is becoming more and more complex, the resulting inference is that litigants seeking redress will continue to grow in number, thus presenting an opportunity and a duty on the part of the bar to provide adequate representation.

In many cases, the individual who has a grievance or who has been called before one of the agencies for a violation of some activity within its control will feel that he does not need an attor-

[18] "Rate making, of course, is a legislative process," Prentis v. Atlantic Coast Line, 211 U. S. 210, 226; "In the fixing of rates—*a legislative act*—the legislature has a broad discretion which it may exercise directly or through a legislative agency in accordance with standards prescribed by the legislature," St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38; "Process in the form of a notice to a corporation to be affected by a contemplated or intended order (as to rate making) of the commission . . . is neither contemplated nor provided for, . . . nor is essential to the validity thereof," Randall Gas Co. v. Star Glass Co., 88 S. E. 840, 78 W. Va. 252.

[19] 239 U. S. 441.

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