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not to be prejudiced by the position of the accused on trial for crime. It is so used in Massachusetts:

> "the presumption of innocence means that the finding of an indictment by the grand jury ... [is] not to be regarded as circumstances tending to criminate the defendant or creating against him unfavorable impressions, and that he is not to be found guilty upon suspicion or conjecture but only upon evidence produced in court."[52]

But, while an instruction on the presumption of innocence may be an aid to a fair trial, it is not a requisite to a fair trial. The test of the fairness of the trial and conviction should be whether the correct principles of the criminal law have been applied, and not whether a particular word formula has been used to state those principles.

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THE MORGAN CASE AS A THREAT TO THE FULL HEARING REQUIREMENT IN RATE MAKING PROCEEDINGS

Once hailed as the champion of the "full hearing" doctrine in administrative law, the *Morgan* case,[1] finally concluded at the last term of the Supreme Court after eleven years of proceedings, stands today as a serious threat to the entire function and purpose of that principle.

Morgan,[2] a sheep commissioner in Kansas City, had, since 1923, charged for services in compliance with an order of the Secretary of Agriculture.[3] In 1930, however, it came to the Secretary's attention that Morgan's rates were too high. To remedy such impositions upon

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[52]Commonwealth v. Madeiros, 255 Mass. 304, 151 N. E. 297, 300 (1926), quoting from Commonwealth v. De Francesco, 248 Mass. 9, 142 N. E. 749, 750, 34 A. L. R. 937, 938 (1924).

[1]Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. ed. 1288 (1930); 23 F. Supp. 380 (1937); 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129 (1938); 304 U. S. 23 (1938); 24 F. Supp. 214 (1938); 307 U. S. 183, 59 S. Ct. 795, 83 L. ed. 1211 (1939); 32 F. Supp. 546 (1940); 61 S. Ct. 999 (1941). This extended litigation reached the Supreme Court five times. (The citations to lower federal court cases refer to decisons of the Federal District Court for the Western District of Missouri).

[2]Although the petitioners involved in this litigation consisted of several marketing agencies doing business about Kansas City, it will facilitate the narration of the fact situation if they are referred to throughout the article as "Morgan."

[3]Hereinafter referred to as the "Secretary." "Several incumbents of the office acted in the case at successive dates. The term Secretary is used to designate the official who acted in any instance." United States v. Morgan, 61 S. Ct. 999, 1005 (1941).

the public, the Secretary has power, under the Packers and Stockyards Act,[4] to prescribe rates for the future. Under the Act, however, two conditions are put upon the exercise of this power: (1) The Secretary must be of the opinion that the existing rate is unjust, and (2) this opinion must be the result of a "full hearing" accorded to the commissioner.[5]

After three years of proceedings, the Secretary, in June, 1933, ordered Morgan to charge a lower rate for his services. Pending his attack on the validity of the Secretary's order, Morgan secured a temporary injunction against it's enforcement and thereafter paid the difference between the old and new rate into a Federal District Court to be impounded until a final determination of the controversy should be reached. To establish the plea that he had not been given a full hearing, Morgan alleged that the Secretary had neither read nor heard the evidence, argument, or brief, but had, nevertheless, (upon an assistant performing the foregoing) undertaken to make the findings and fix the rates. The Supreme Court held these allegations sufficient to require an answer from the Secretary, and thereupon sent the case back to the District Court. This decision stands for the important rule of administrative law that "he who decides must hear."[6] After the Secretary had answered the allegations, the District Court held that, as a matter of law, the Secretary had given Morgan that hearing to which he was entitled under the Act.[7]

Urging still further procedural deficiencies in the Secretary's proceedings, Morgan appealed again to the Supreme Court on the full

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[4]42 Stat. 159 (1921), 7 U. S. C. A. § 181 et. seq. (1939).

[5]Packers and Stockyards Act, 42 Stat. 159, § 310, 7 U. S. C. A. 211 (1939): "Whenever, *after full hearing* . . . the Secretary is of the opinion that any rate . . . is or will be unjust . . ., the Secretary may determine and *prescribe* what will be the just and reasonable rate . . . to be *thereafter* observed in such case . . . ." (italics supplied).

[6]Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. ed. 1288 (1936). The court thought these allegations sufficient to require an answer of the Secretary upon the question of whether Morgan had had a "full hearing," and sent the case back to the District Court with the holding that the conclusiveness the law ascribed to findings rested upon the assumption that the one who made the findings had considered the evidence and reached his conclusion therefrom.

[7]Morgan v. United States, 23 F. Supp. 380 (1937). The court held that the Secretary had read parts of the transcript of the testimony, the oral arguments and the briefs submitted by Morgan. They held these facts to be proven unless the court should "reject the testimony of the Secretary of Argiculture as incredible." The court felt that the "alternative, absent a much stronger showing, than is here, is not to be thought of in connection with the testimony of an honorable and distinguished head of a great executive department of the Federal government."

hearing issue. It was established that no brief was prepared by the Secretary in the hearing preceding the order, and that no opportunity was afforded to Morgan for an examination of the findings. He thus had little information of the government's concrete claims until he was served with the Secretary's final order. The Supreme Court, therefore, held the hearing to be fatally defective and the order of the Secretary invalid.[8]

This decision was rendered in 1938. Meantime, in 1937, the Secretary and Morgan had come to an agreement, and the latter was allowed to raise his rates from December 1, 1937. Still undisposed of, however, were the excess rates collected by Morgan and paid into the court from 1933 until 1937; and, since the Secretary's order to charge lower rates had been invalid, Morgan thought himself entitled to have the impounded fund returned. He petitioned for a rehearing by the Supreme Court for the return of that money, but the Court held that the request was a matter for the court that held the funds.[9]

The Secretary now contended that by remedying the procedural deficiencies he could validate the order as of the original date of its issuance, 1933, and he therefore reopened proceedings to determine what were reasonable rates during the period between 1933 and 1937. Morgan considered the Secretary's investigation purely academic, and the District Court concurred. With the observation that it failed to perceive how the contention of the Secretary had "any shred of reason or law to support it,"[10] the court directed that the money be returned to Morgan.

The Secretary, however, appealed to the Supreme Court, and the majority of judges therein considered that any disposition of the fund should await the results of the reopened proceedings before the Secretary.[11] The Court held that the administrative order, although it

[8]Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129 (1938), rehearing denied, 304 U. S. 23. The Court held that a right to a hearing embraced not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. It was further decided that Congress, in requiring a "full hearing" had regard to judicial standards—not in any technical sense but with respect to those "fundamental requirements of fairness" which are of the essence in a proceeding of a judicial nature. Compare Local Government Board v. Ardildge, [1915] A. C. 120, where the English court held that only something called "natural justice" was necessary, and that it was not necessary to have judicial procedure, but only a conscientious consideration of the case.

[9]Morgan v. United States, 304 U. S. 23 (1938).

[10]Morgan v. United States, 24 F. Supp. 214, 215 (1938).

[11]United States v. Morgan, 307, U. S. 183, 59 S. Ct. 795, 83 L. ed. 1211 (1939).

had been held invalid, was not a nullity.[12] But of the three cases cited as authority for this proposition, not one has concern with defective administrative orders.[13] Quite to the contrary, the Supreme Court has frequently stated that when an administrative agency makes an inappropriate exercise of the powers delegated to it, the resulting order is void.[14]

The decision of the Court to await the result of the reopened proceedings was, however, based upon equitable grounds, it being held that the District Court was acting as a court of equity in the premises. It was felt that if the Secretary's reinvestigation should show that the rates ineffectively ordered to be charged between 1933 and 1937 were *now* found to be just and reasonable by proper proceedings, it would then be unjust and inequitable to allow Morgan to retain the excess.

This disposition of the case placed the Secretary in a peculiarly privileged position. A court of equity has no power to determine retroactive rates,[15] but here the court in effect relegated the Secretary to the position of a special master for just that purpose. Such action is unprecedented, and its only attempted justification was couched in the most vague and unpersuasive language.[16] It is certainly proper to allow an administrative officer in 1939 to state his opinion on what he believes would have been a good rate to have been charged in 1933, but it is something else when he is allowed to give that opinion the force of law. There is no practical difference whether it is changed from

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[12]United States v. Morgan, 307 U. S. 183, 196, 59 S. Ct. 795, 802, 83 L. ed. 1211 (1939).

[13]Ewell v. Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682 (1883) (case involving a usury statute of Texas and not oncerned with the administrative orders); Weeks v. Bridgeman, 159 U. S. 541, 16 S. Ct. 72, 40 L. ed. 252 (1895) (no question of any improper hearing making an administrative order valid or invalid); Toy Toy v. Hopkins, U. S. Marshall, 212 U. S. 542, 29 S. Ct. 416, 53 L. ed. 644 (1909) (only held that after the Circuit Court of Appeals had heard and passed on the evidence affecting the jurisdiction, its judgment is open to review in the appellate court by writ of error, but that its judgment could not be attached collaterally as absolutely void).

[14]The Chicago Junction Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. ed. 667 (1924); Florida v. United States, 282 U. S. 194, 51 S. Ct. 119, 75 L. ed. 291 (1931).

[15]Atchison, T. & S. F. Ry. Co. v. Arizona Grocery Co., 49 F. (2d) 563 (C. C. A. 9th, 1931). See particularly pages 568 and 569 and cases cited therein to the effect that a legislative body, unlike a court, can establish such laws retroactively unless they violate the due process clause. "... The commission, having established a legal and lawful rate, the freight charges thus ... collected become the property of the carrier and cannot by a new retroactive law be taken away by legislative fiat."

[16]"He [Secretary of Agriculture] was free to make an order fixing rates for the future, and for that purpose or for any other within the purview of the Act he is now free to determine a reasonable rate for the period antedating any order he may now make." 307 U. S. 183, 192, 59 S. Ct. 795, 800, 83 L. ed. 1211 (1939).

an opinion to a law by allowing the Secretary to issue an administrative order effecting such a rate, or whether it is changed from an opinion to a law by an equity court holding that the Secretary's opinion shall set the court's standard for a just rate and, thereupon, dispose of the impounded funds accordingly. In either case a *nunc pro tunc* order is effected, all invalidating procedural deficiencies are removed, and the "full hearing," made by statute a condition precedent to the issuance of a valid order, is neatly circumvented.

It is hard to beleive that this escaped the notice of the Court, and that that high tribunal actually enabled the Secretary to do under the guise of some vague, deceptive equitable concept that which would have been improper and illegal for it to empower him to do through his regular administrative channels. The opinion, however, indicates that this may be true, for it is therein stated that the court and the administrative bureau are to work together and cooperate to attain the prescribed end of a statute.[17] While this is true to a certain extent, such collaboration should never operate so as to incline the court toward the government as a party to litigation.

After this dubious decision, there was nothing to do but await the results of the Secretary's reopened proceedings. In 1938, when he directed that the rehearings be held, the Secretary ordered the "proceedings, findings of fact, conclusions and order" issued in June, 1933, served upon Morgan as the "Tentative Findings of Fact, conclusion, and proposed order of the Secretary." After argument, in 1939, the Secretary entered a new order holding that the old rates and charges collected during 1933 to 1937 were unjust and unreasonable, and prescribing as just and reasonable, the identical rates (even to the fourth decimal place) prescribed in the invalid order of 1933.[18]

The District Court refused to carry out the order and again directed that the funds be returned to Morgan.[19] The decision and the

[17]"... Court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duties without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adapted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action." Morgan v. United States, 307 U. S. 183, 191, 59 S. Ct. 795, 799, 83 L. ed. 1211 (1939).

[18]This meant that the $586,000 which Morgan had deposited with the District Court, and which he claimed as vital to his business existence was to be returned in some 1,870,000 items to the shippers who had paid it to Morgan. On an average basis this amounts to less than 31 cents an item.

[19]Morgan v. United States, 32 F. Supp. 546 (1940).

reasoning therefor are very convincing. The court held that the Secretary refused to avail himself of new data, and that at the new hearing, nothing was added to the old record by the government, despite the existence of overwhelming evidence that business variations had necessarily wrought great change in the operations of the market. The court considered it conclusively proved that the Secretary had made *no effort* to ascertain the reasonableness of the rates during the impounding period, and thus, because of a preconceived notion of his power under the Act, had denied Morgan the fair hearing before an impartial tribunal as required by the due process clause.[20]

Upon a new appeal to the Supreme Court, however, the Secretary secured a reversal and had his order of 1933 upheld as effective to determine the rates Morgan was to be allowed to charge as between 1933 and 1937. The Court held that the Secretary's findings conclusively showed that his determinations represented a judgment of 1939 and not a prophecy of 1933.[21] The District Court had had just as strong convictions that the conclusion represented a 1933 prophecy.

There seems to be only one case that can serve as authority for this remarkable decision, *Atlantic Coast Line R. R. Co. v. Florida*.[22] The fact situation there was somewhat similar. In 1928, the Interstate Commerce Commission prescribed new and higher intrastate rates for application in Florida by the defendant railroad. On the petition of the shippers, the United States Supreme Court, in 1931, held the order invalid because not supported by appropriate findings.[23] Mean-

[20]A memorandum to the Secretary from the Administration of the Packers and Stockyards Act told the Secretary of defects in the 1933 rate structure. The district court believed that the submission of this memorandum which was ignored by the Secretary, standing alone, but certainly in connection with the offers of proof by Morgan, conclusively proved this preconceived notion of the Secretary that he had power under the Act to issue the *nunc pro tunc* order and made no effort to ascertain the reasonableness of rates during the impounding period.

The court concluded that it was clear from the record that the object of the Secretary through the reopened proceedings was to procure the validation, *nunc pro tunc*, of the fatally defective order of 1933, and that he was of the opinion that this was possible by merely going through a perfunctory argument.

[21]In holding the Secretary's job to be more than "merely to reflect the items on a profit and loss statement," but one involving the "appraisal of elements having delusive certainty," the court said: "It is not for us to try to penetrate the precise course of the Secretary's reasoning. Our duty is at an end when we find, as we do find, that the Secretary was responsibly conscious of conditions at the market during the years following 1933, that he duly weighed them, and nevertheless concluded that rates similar to those in the 1933 order were proper." Morgan v. United States, 61 S. Ct. 999, 1003 (1941). "Similar" to the fourth decimal place!

[22]295 U. S. 301, 55 S. Ct. 713, 79 L. ed. 1451 (1935).

[23]Florida v. United States, 292 U. S. 1, 54 S. Ct. 603, 78 L. ed. 1077 (1934).

time, in 1929, the rates as prescribed had been put into effect and the difference between the old and new rates was impounded, pending the decision on the validity of the commission's order. After the order was held invalid, the commission reopened the proceedings, made comprehensive findings, and entered the same order. The shippers sought the return of the impounded funds, the difference between the old railroad rate and the higher rate charged under the invalid order of the commission, but the Court refused the refund. The basis of the refusal was the equitable nature of the proceeding. The following passage of the opinion is an excellent embodiment of the whole rationale of this decision and, in part, the *Morgan* decision.

> "... in the light of its present knowledge, the court will stay its hand and leave the parties where it finds them.... To this the claimants answer that inaction in such circumstances is an assumption by the federal court of legislative powers.... The argument misses the significance of equitable remedies. The federal court.... does not undertake to say that the rates collected by the carrier were lawful in the sense that a suit would lie to recover them if credit had been given to the shipper and a balance were now unpaid. *All that the federal court does is to announce that it will stand aloof.* It inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief.... the charges were collected under color of legal right.... *what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays....*"[24]

Thus the railroad was allowed to keep the higher rate it had collected under the invalid order. The Court implied that the shippers individually might sue the railroad for the difference, but held that the Court would not lend its aid toward return of the impounded fund. If it be assumed that the decision in the *Railroad* case[25] was proper, a serious question still remains as to whether it will support the decision in the *Morgan* case. The former decision is representative of a fundamental practice of the court of equity—i.e., refusal to act where to lend its aid would work an injustice. In the *Morgan* case, however, the Court *did* lend its aid; it did more than simply leave the parties where it found them. It ordered money deposited by

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[24]Atlantic Coast Line R. R. Co. v. Florida, 295 U. S. 301, 314-315, 55 S. Ct. 713, 713-5, 79 L. ed. 1451 (1935). (Italics supplied).

[25]Atlantic Coast Line R. R. Co. v. Florida, 295 U. S. 301, 55 S. Ct. 713, 79 L. ed. 1451 (1935).

Morgan to be returned to other persons.[26] In the *Morgan* case, the Court did not ignore the distinction of the two cases as one of judicial inaction as against action, but it again justified its holding in delusive terms. It felt that because of the actual "posture" of the case, it was under a self-imposed duty to act by virtue of having taken the fund into its possession.[27] Assignment of the different "posture" of the case as justification for positive equitable action is deceptive in its intended inference that the principles involved in the two cases are the same and that the only difference is in the position of the parties. There is a great deal more difference than this, however, between the equitable inaction in the *Railroad* case and the equitable action in the *Morgan* case. In the *Railroad* case the inaction may only deny a type of remedy; but, in the *Morgan* case postive equitable action operates to determine a substantive right—i.e., the return of the money to the shippers and a preclusion of any chance of Morgan's recovering.

Noticeably absent, also, was a recognition of the difference in degree between the *Railroad* and the *Morgan* cases. In the former the order was held invalid merely because the findings were not drawn up properly. In the *Morgan* case, however, the whole procedure by which the full hearing was attempted was improper. This is a distinction at least worthy of notice, if not sufficient to alter the result.

In each of these cases, the Court delved into the realm of abstract justice and made dispositions of the cases extra-legally on that basis. The point missed, however, is that there is no such thing as an abstractly unjust or unreasonable rate. There cannot be an unjust rate until it is properly so called by the legislature or its delegate. In these instances, the legislature of the United States delegated the power to administrative agencies. The only way for the agencies in either case to find a rate unjust was to accord those concerned a full hearing. Until this was done there could exist no unjust or illegal rate. When it was

[26]Those series of transactions must be considered the acts of Morgan—the shippers paying to Morgan and Morgan impounding the excess funds. See 307 U. S. 183, 185, 59 S. Ct. 795, 83 L. ed. 1211 (1939) for the impounding order. Morgan cannot be considered as the agent of the shippers here.

[27]The Court felt that had the shippers paid to Morgan instead of to the court, the Secretary could have ordered a return to the shippers, but here the Court missed a fact because the shippers did pay Morgan and Morgan paid the money into court. Besides, the Court failed to give any reason or to cite any authority for this proposition. It would seem to be directly in conflict with the Railroad case if the Secretary could direct a return to the shippers. The alleged justification for the Morgan decision, then, is that the Court has power to correct that which has been wrongfully done "by virtue of its process," but in this instance, at least, the Court's consiousness of its wrong-doing was unwarranted.

done it only made the rate unjust as of that date. The rate of the day before, though mathematically equal, remained absolutely just and equitable.

In the *Morgan* case, a valid order was not made until after the rates had been changed. It is difficult to see how the later valid order can apply retroactively to affect rates in force prior to its existence. Although the later order was supported sufficiently by evidence, this was not true of the first. The administrative official may not rely upon evidence taken in a former proceeding on an entirely different issue. Congress gave the Secretary alone power to find injustice in the rates; it did not give such power to the courts.[28] The assumption of equitable power in the *Morgan* case seems unsupportable and to amount to nothing less than a *nunc pro tunc* validation of a former invalid administrative order.[29]

It is difficult to see what incentive lies in the decisions of the *Morgan* and *Railroad* cases toward making a commission conduct a fair hearing or fulfill any other formal conditions put upon its power of fixing rates. Indeed the incentive runs the other way. Upon a gesture or mere pretense of meeting procedural requirements, the commission might issue its order, confident that when it "got around to it," perhaps years later, it could fulfill these mere formalities by making proper findings and according to those affected a full hearing, and thereby validate the order *ab initio*. Since the administrative agency must necessarily have so much power with regard to finality of its factual determinations,[30] it seems essential that courts, instead of

[28]Atlantic Coast Line R. R. Co. v. Florida, 295 U. S. 301, 327-8, 55 S. Ct. 713, 724, 79 L. ed. 1451 (1935). Roberts, J., dissenting.

[29]A legislative body, unlike a court, can establish rates retroactively unless it amounts to taking of property without due process of law. Rates collected under an existing schedule cannot by later retroactive law be taken from the collector. The Supreme Court has adopted this view. See Arizona Grocery Co. v. Atchison, T. & S. F. Ry., 284 U. S. 370, 52 S. Ct. 183, 76 L. ed. 384 (1932), which declares that it has been upheld by a majority of the state courts. It is true that so long as the rate existed the shipper was bound to pay it, but later, upon its being shown invalid, he should be allowed reparation. If instead of asking reparation in both the Morgan and the Railroad cases, separate actions had been instiuted against the collector of the rate, there would have been a prime facia case for recovery, and the plea of the void order would not have been allowed as a defense. See dissent of Mr. Justice Roberts in Atlantic Coast Line R. R. Co. v. Florida, 295 U. S. 301, 318, 55 S. Ct. 713, 720, 79 L. ed. 1451 (1935).

[30]This raises another point pressed in the Morgan case, and the conclusions of the Court upon it are right and proper. It is upon the question of the finality to be given to the administrative proceedings. On this point, it must be taken as settled that the judicial inquiry into the facts goes no further than to ascertain whether

countenancing questionable methods, should apply strict sanctions to compel the agency to proceed properly.

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there is any evidence to support the findings, and that all questions as to weight of evidence lie within the determination of the agency. Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 50 S. Ct. 220, 74 L. ed. 524 (1930); Fayerweather v. Ritch, 195 U. S. 276, 25 S. Ct. 58, 49 L. ed. 193 (1904). Certainly evidence existed in the Morgan case in sufficient quantities to enable the Secretary to make the findings he did.

The administrative agency from its very nature must be trusted. If the evidence is presented to the examiner and brought to his attention, it is beyond the poor power of any man to say whether the examiner weighed the evidence and appraised it. As was said by Otis, J., dissenting in Morgan v. United States, 32 F. Supp. 546, 556 at 558, 561 (1940): "... there is no satisfactory way under heaven to dislodge a biased and prejudiced agency . . ., and where the decision of the agency, so functioning, as to every issue of fact, if supported by any evidence (however defiant of the weight of the evidence), is made as conclusive as the command of a despot. . . . The remedy, if the Secretary shall violate his duty, is by appeal to the President to remove him or to the Court of Impeachment."