

normally operative rule leaves the drawer without remedy in this one instance. By the shifting of liability, this amendment serves as a conduit through which the commercial world has forced the drawer to rely upon insurance. Relegated to this position, the drawer then seeks to protect himself from commercial loss and is not concerned with the labels placed by the criminal law upon the acts causing his loss. Under these circumstances, a court cannot fairly conclude that the insured intended to be subjected to the modern counterparts of common law anomalies such as the larceny-false pretenses distinction. Based also upon considerations of fairness, Article 2 of the UCC provides that risk of loss falls upon a breaching party only to the extent to which it exceeds the other party's insurance.²⁸ Thus, insurance coverage is now an item to be pleaded at the trial of a contract action and ambiguous policy terms should be construed in accordance with business usage.

The law regarding fictitious payees is not relevant to the definition of forgery as used in the bond. Plaintiff's claim in the principal case could have been sustained without the agency holding. Given the proper agency relationship, and assuming for a moment that the standards of the local criminal law must be met, defendant's contention still lacks merit. Section 9(3) of the NIL relieves the bank from liability for cashing the forged check for purposes of commercial loss placement. In doing so, it does not state that the indorsement is not forged nor that it in any way purports to change the criminal law. The indorsements are still essential as a practical matter, since the instruments are not known as bearer paper until the fraud is discovered. But compliance with criminal law standards should not be necessary. The burden of placing a definition more narrow in scope within the four corners of the policy rests with the drafting party. In the absence of such stipulation, the intent of the parties must be sought. Principles of fairness are contravened when a construction contrary to that of common business usage is adopted as having been intended by a party who relies upon insurance out of commercial necessity. This is especially true when such construction favors the party who has received consideration for assuming the risk of loss.

MICHAEL J. DORNEY

Public Utility Company—Rates—Judicial Review.—*Pacific Tel. & Tel. Co. v. Hill*.¹—In May, 1958, the plaintiff, the Pacific Telephone and Telegraph Co., filed new tariffs with the Public Utilities Commission in order that its rate of return on investment, plant materials and supplies would be raised from 5.42 per cent to 7.04 per cent on the basis that the present 5.42 per cent return was confiscatory. The commissioner held a hearing at which it was determined that the 5.42 per cent rate was confiscatory

²⁸ UCC § 2-510.

¹ 365 P.2d 1021 (Ore. 1961).

and that a fair return would be 6.35 per cent. An order to that effect was issued. The controversy centered around the allocation of the company's property between inter and intrastate use to establish the state rate base. The order employed \$126,794,131 (average investment for test period) tentatively as the rate base, but reduced this amount to \$120,600,017. The reduction of \$6,194,114 was arrived at partly by the use of an expert's formula which tripled the actual use and a new application of the standard M-M-M formula.² Thus property worth \$6,194,114 was treated as non-intrastate. The company appealed³ to the circuit court, Marion County, which sustained its objections whereupon the commissioner appealed to the supreme court. HELD: The commissioner's findings as to interstate and intrastate allocation of the company's property were insufficient for judicial review. The court found that there was no evidential basis for determining (1) that the value of an interstate call was three times the value of an intrastate call and (2) that the M-M-M formula used by the commissioner, as applied to a plant serving both intra and interstate use, was not based on a finding that the property thus reduced from the intrastate rate base was not used in intrastate operation.

The central focus of the case results from the dissenting opinion of Justice O'Connell with Justice Sloan concurring, in which he sharply criticizes the majority for exercising its independent judgment and subjecting the commission's findings to a de novo review "under the so-called authority of the 'Ben Avon' doctrine."⁴ The *Ben Avon* doctrine is best stated in the words of the court that conceived it:⁵

In all such cases if the owner claims a confiscation of his property, will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment.

It is surprising that the dissent should be so vigorous in the denunciation of de novo review in as much as the same court has previously specifically admitted the necessity of de novo review after a charge of confiscation.⁶

² Id. at 1033, "The Manual explains the formula of M-M-M in these words: The term 'conversation' (message-minute-miles) is the product of (a) the number of messages, (b) the mileage haul and (c) minutes of conversation per message. The purpose of course is to secure the dimensions of the average call."

³ Ore. Rev. Stat. § 756.580.

⁴ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920).

⁵ Id. at 289.

⁶ *Valley & Siletz R.R. v. Flagg*, 195 Or. 683, 714, 247 P.2d 639, 654 (1952): "The fact that in cases which are based on averments of confiscation the courts try the issues de novo. . . ." *Pacific Tel. & Tel. Co. v. Wallace*, 158 Or. 210, 75 P.2d 942 (1938). But see *Butcher v. Flagg*, 185 Or. 471, 203 P.2d 651 (1949): "In our opinion the plaintiffs have failed to 'show by clear and satisfactory evidence' that the order of the Commissioner is not supported by substantial evidence, or that such is unlawful, or that the Commissioner erred in the application of the rule of law to the matter under consideration."

The doctrine should not be simply referred to as the *Ben Avon* doctrine—for, if it exists at all, it no longer exists in its original form. *Ben Avon* was modified or clarified in the *St. Joseph* case where the Court said: "Judicial judgment may be nonetheless appropriately independent because informed and aided by the sifting procedure of an expert legislative agency."⁷

To be sure neither the *Ben Avon* doctrine nor the modified *Ben Avon* doctrine has been followed in the Supreme Court⁸ and at least in the federal courts it has been mitigated by the acceptance of the substantial evidence rule,⁹ and again further when the Supreme Court held:

... [that] it is the result reached [and] not the method employed which is controlling . . . it is not [the] theory but the impact of the rate order that counts . . . if the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end.¹⁰

The present status of the doctrine is at best in doubt and the subject of some speculation.¹¹ To be sure many states do not allow for the independent judgment of a de novo review but apply the substantial evidence rule¹² or variations thereof short of complete independent review. Of these some jurisdictions have specifically stated that they do not exercise independent judgment.¹³ *Ben Avon* is accepted and still has vitality in a few jurisdictions.¹⁴

⁷ *St. Joseph Stock Yard Co. v. United States*, 298 U.S. 38 (1936).

⁸ *Supra* note 1, at 1037 (dissent); see also 4 Davis, *Administrative Law Treatise* § 29:09, at 167 (1958).

⁹ *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942); see also Mr. Justice Brandeis dissent, *Ohio Valley Water Co. v. Ben Avon Borough*, *supra* note 4, at 292.

¹⁰ *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

¹¹ Miller and Joslin, *Public Utility Rate Regulation: A Re-examination*, 43 Va. L. Rev. 1027, 1044 (1957):

But, on policy grounds as well as it being the teaching of many cases in the state courts, it is evident that *Ben Avon* is followed and should be followed. . . . It can be stated without equivocation that *Ben Avon*, Professor Davis to the contrary notwithstanding, has not died. As modified by the *St. Joseph Stock Yard* and the *Hope* decisions, the *Ben Avon* doctrine allows for an independent review of rate-making but attaches a presumption validity to the administrative findings.

Jaffee, *Judicial Review: Constitutional and Jurisdictional Fact*, 70 Harv. L. Rev. 953, 982 (1957), "But even assuming that *Ben Avon* is still law, its operational impact has been enormously mitigated." 4 Davis, *Administrative Law Treatise* § 29:09, at 167 (1958). The author feels that the *Ben Avon* doctrine has gradually died.

¹² Forkosch, *Administrative Law* 246 (1956): "In other words the judiciary treats the agency as it would a jury asking only whether the jury had sufficient evidence before it upon which it could proceed." Stason, *Substantial Evidence in Administrative Law*, 89 U. Pa. L. Rev. 1026, 1036 (1941): [Substantial evidence] . . . "may be related to the term arbitrary and capricious action in such a manner as to prevent setting aside decisions only if found to be arbitrary. Indeed the view seems to be rather frequently adopted by the courts."

¹³ 4 Davis, *op. cit. supra* note 8 § 29:09, at 176-78, Arizona, Arkansas, California, Delaware, Idaho, Illinois, Louisiana, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island.

¹⁴ *Valley & Siletz R.R. v. Flagg*, 194 Or. 683, 247 P.2d 639 (1952); *Southern Con-*

CASE NOTES

However the majority of jurisdictions limit judicial review of administrative rate orders to the lawfulness and reasonableness of the order and to whether the order is supported by substantial evidence. That is, in looking at the whole record, the court must answer the simple question whether the evidence supports the finding.¹⁵

It is submitted that there is no nice, tight definition into which this substantial evidence test can be fitted. It is a flexible test which varies from what appears to be a minimal, superficial and approving glance at the record usually with the bland statement that the commissioner's findings carry with them the presumption of validity, to a thorough and complete review which looks into every corner, with the equally all-encompassing statement that the plaintiff carries the burden of proof. The latter, although without saying so, many times approaches *de novo* review.¹⁶

It does not seem that the smoke screen of the supposed evils of the *Ben Avon* doctrine raised by the dissent was proper. The company's appeal from the order was handled in the best tradition of the substantial evidence rule, flexible as it may be. The plaintiff was not challenging the 6.35 per cent rate of return but the allocation of its property.

The majority correctly determined that if the disputed property was devoted to intrastate use the plaintiff company would be denied any return on that property and thus its actual rate of return would be 5.71 per cent which is less than the commissioner had established as a fair return. The majority also pointed out that should this property be shifted to interstate, a 10.15 per cent increase in its interstate rate would be necessary. The underlying reasoning of the majority was the hardly arguable rule that intrastate property should not be shifted to interstate for rate making purposes to lighten the intrastate burden. Regardless of value or formula, a proper allocation between interstate and intrastate property should be made.¹⁷

tinental Tel. v. Railroad & Pub. Util. Comm'r, 199 Tenn. 122, 285 S.W.2d 115 (1955); *Railroad Comm'r v. Houston Nat. Gas Corp.*, 155 Tex. 502, 289 S.W.2d 559 (1956); *Iowa Gas & Elec. Co. v. City of Ft. Dodge*, 248 Iowa 1201, 85 N.W.2d 28 (1957); *Application of Northwestern Bell Tel. Co.*, 69 S.D. 36, 6 N.W.2d 165 (1942); *Staten Island Edison Corp. v. Maltbie*, 296 N.Y. 374, 73 N.E.2d 705 (1947); *Opinion of the Justices*, 328 Mass. 679, 106 N.E.2d 259 (1952); *Central Maine Power Co. v. Pub. Util. Comm'r*, 156 Me. 295, 163 A.2d 762 (1960).

¹⁵ 42 Am. Jur., *Public Administrative Bodies* § 211 (1942):

In the absence of statutory directions to the contrary, and of any vital defect such as one with respect to jurisdiction or procedure, and except as there may be an exception for findings of fact bearing upon constitutional or jurisdictional issues, it is the general rule that administrative findings of fact are conclusive upon a reviewing court, and not within the scope of its reviewing powers, at least if supported by evidence, or substantial evidence, or competent evidence, or based upon conflicting evidence.

¹⁶ 4 Davis, *op. cit.* *supra* note 8, § 29:11, at 186, see also § 29:08, at 152: "The scope of review in state courts varies not only from state to state but often from agency to agency within the same state." See also Notes, 15 Wyo. L.J. 6 (1960), 6 Utah L. Rev. 406 (1959).

¹⁷ *Wheat, Interstate Telephone Rates*, 51 Harv. L. Rev. 846; *Smith v. Bell Tel. Co.*, 282 U.S. 133 (1930); *The Minnesota Rate Cases*, 230 U.S. 352 (1912).

Here, although this court has reviewed rate determinations *de novo* when the charge of confiscation is made,¹⁸ it does not appear that the court did in fact in this instance review *de novo*. It must be admitted that it was perhaps close to *de novo* review,¹⁹ for the plaintiffs had the burden of proof.²⁰ But even by a *rigid* substantial evidence test the allocation could not stand. Because the commissioner's duties were outlined,²¹ the court found it easy to say: "we have mentioned that there is no *finding* that the rate base . . . which the commissioner's order shifts from intrastate to interstate . . . are not employed and incurred in the operation of the intrastate plant."²² *De novo* review is not to be condemned merely because the Supreme Court now provides for less review, for although perhaps not constitutionally necessary, there is nothing to restrict a state from providing *de novo* review or substituting its independent judgment.²³

JOSEPH L. COTTER

Sales—Transfer of Title—Federal Retailers' Excise Tax.—*Around The World Shoppers Club v. United States.*¹—*Around The World Shoppers Club* (Club) was an enterprise to which persons subscribed to receive "gifts" which were shipped directly to them from a different foreign country for each month of their subscription. To join, the persons submitted to the Club an application for membership and payment in advance for the "gifts." Upon acceptance of the application, the Club sent a label bearing the member's name and address to foreign suppliers which had agreed with the Club to ship "gifts" to its members. The Club handled all communications both with its members and with the foreign suppliers. The suppliers were responsible only to the Club for adjustment of any claims against them and received payment for the "gifts" from the Club. The Club brought suit to recover a part payment made under a Federal Retailers' Excise Tax² assessment on the value of the "gifts" which had been sent to its members. The U.S. District Court, in granting a government counterclaim for the unpaid

¹⁸ Supra note 6.

¹⁹ Supra note 1, at 1032, "So that we will not be misunderstood we add that the evidence affords no basis for determining the value of a call or of saying that an interstate call has any greater value than an intrastate call."

²⁰ Ore. Rev. Stat. § 757.585 (1959). But see supra note 1, at 1025, "The company's witness established at least *prima facie* that the part of the plant represented by the sum of \$6,194,114 was devoted to intrastate service . . ." (emphasis added).

²¹ Ore. Rev. Stat. § 757.055 (1959), "The Commissioner shall value all the property of every public utility used or useful for the convenience of the public . . .," Ore. Rev. Stat. § 756.550(3) (1959), "After the completion of the taking of evidence and within a reasonable time the commissioner shall prepare and enter findings of fact and conclusions of law upon all the evidence received in the matter and shall make and enter his order thereon. . . ."

²² Supra note 1, at 1036.

²³ See Opinion of the Justices, supra note 15.

¹ 198 F. Supp. 773 (D.N.J. 1961).

² 68A Stat. 473 (1954), 26 U.S.C. §§ 4001-057 (1958).