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INDEPENDENT JUDICIAL REVIEW OF ADMINISTRATIVE RATE-MAKING: THE RISE AND DEMISE OF THE *BEN AVON* DOCTRINE

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I. INTRODUCTION

IT has been over fifty years since the Supreme Court of the United States decided *Ohio Valley Water Co. v. Ben Avon Borough*.[1] Throughout this period the case has stood, with varying degrees of fortitude, for the proposition that public utilities are entitled to independent judicial review of tariffs fixed by administrative rate-making bodies. The rule, based on the notion that constitutional due process requires the sanctity of de novo court review prior to any "taking" of property from a utility, is at best a dubious one. Yet more pernicious than the rule itself has been the uncertainty surrounding it. Various scholars and courts, viewing the case law both prior and subsequent to *Ben Avon*, have taken the position that it is no longer good law. It is the purpose of this article to take a long and, hopefully, final look at the life of the *Ben Avon* rule, with a view toward hastening its interment.

The *Ben Avon* case arose out of an investigation by the Public Service Commission of Pennsylvania, acting upon a complaint that the Ohio Valley Water Company had been charging excessive rates. The company, dissatisfied with the determination and concomitant rate reduction issued by the Commission, appealed to the Pennsylvania Superior Court, which reversed the order and directed that rates sufficient to yield a seven percent return be authorized. The Pennsylvania Supreme Court reversed, primarily on the ground that the courts did not have the power "to determine the question of confiscation according to their own independent judgment when the action of the Commission comes to be considered on appeal."[2] The United States Supreme Court, in a virtually unprecedented decision, disagreed. The Court held:

> [I]f the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination

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1. 253 U.S. 287 (1920).

2. Id. at 289.

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.[3]

The import of the *Ben Avon* decision is quite clear. It provides a public utility with a second chance to obtain a rate increase or challenge a rate reduction after the matter has been finally passed upon by the administrative or quasi-legislative body charged with the duty to fix such rates. Such a de novo trial literally wipes the slate clean and theoretically enables the utility to proceed as if no prior determination had been made. The patently undesirable effect of this rule is to undermine the finality and authority of administrative rate-making by permitting utilities to entirely ignore such rates by crying "confiscation" and seeking judicial review. The courts are then faced with the onerous task of sifting through volumes of economic data and generally contradictory expert testimony without the refined expertise of the specialists who sit on public service commissions and attempting to arrive at a more enlightened judgment than the administrative body that has already undertaken the task. Not only does this tend to unnecessarily burden our already overworked trial courts, but it also tends to decrease the quality of the determination by imposing a Herculean task on trial court judges, many of whom are simply not up to it.

If the inherent unsoundness of the rule were not bad enough by itself, the problem has become even more complex due to the uncertainty that surrounds its very existence. There are many court-created rules which are unfortunate, but somehow the courts and the bar learn how to both live with and, on occasion, circumvent them. However, when there is widespread doubt as to whether a rule exists at all, the result is often disastrous. Certainty, it must be admitted, is as important to our legal system as justice, and when there is doubt as to what the law is we often find a plethora of inconsistent court rulings. This is exactly what has resulted during the fifty years since the birth of *Ben Avon*. The Supreme Court, after stating the rule, has never seen fit to follow or specifically reaffirm it without some modification, thus leading many to believe that the case has been overruled sub silentio.[4] Moreover, the *Ben Avon* case

3. Id. (citations omitted). Note, however, the dissent of Mr. Justice Brandeis, concurred in by Mr. Justice Holmes and Mr. Justice Clarke, which indicated that review should be limited to the substantial evidence test. Id. at 298 (dissenting opinion).

4. The Ben Avon case was intended to apply only to review of administrative bodies exercising a legislative function, e.g., rate-making, as compared to those exercising a judicial or quasi-judicial function. However, the Supreme Court extended the doctrine to quasi-judicial orders with respect to facts relating to constitutional issues in Crowell v. Benson, 285 U.S. 22 (1932). To discuss the implications and vitality of Crowell in this article would be at best collateral. It is sufficient to note that that case, like Ben Avon, has been narrowly construed and repeatedly distinguished so as to cause considerable doubt as to its present authority. See Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 973 (1957).

itself was a departure from previous rulings wherein the review of rate-fixing orders was limited to the substantial evidence test.[5]

The only case which may be said to have indicated a continued reliance on *Ben Avon* was *St. Joseph Stock Yards Co. v. United States*,[6] and even there the Supreme Court made a substantial retreat from the bold implications of *Ben Avon*. In this case the Court indicated that courts were not empowered to make a truly independent determination but must be guided by the " 'strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing.' "[7] This, it may be argued, is little more than the substantial evidence test in disguise.[8] Since the *St. Joseph's* case the Supreme Court has failed to apply the *Ben Avon* doctrine in many appropriate cases and has indicated a reversion to the pre-*Ben Avon* approach.[9] Moreover, the Court has denied certiorari in the face of a circuit court ruling that the courts may not substitute their judgment for that of rate-making bodies.[10]

The result of all this is that the *Ben Avon* doctrine has become something of a Frankenstein monster, lying in its crypt, only to be sporadically

5. "[C]ourts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." ICC v. Union P.R.R., 222 U.S. 541, 548 (1911).

6. 298 U.S. 38 (1936).

7. Id. at 53, citing Darnell v. Edwards, 244 U.S. 564, 569 (1917). See also the concurring opinion of Mr. Justice Brandeis where he indicated that leaving the "final ascertainment of the facts" to administrative bodies had been held consistent with the Constitution in numerous areas, e.g., eminent domain, taxation, customs duties, and insurance valuation. 298 U.S. at 78-80.

8. See 4 K. Davis, Administrative Law Treatise § 29.09 (1958).

9. E.g., FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 586 (1942) ("Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."); Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573, 581 (1940) ("[C]ourts must not substitute their notions of expediency and fairness for those which have guided the agencies to whom the formulation and execution of policy have been entrusted."); see FPC v. Hope Gas Co., 320 U.S. 591, 602 (1944), which had the effect of limiting the areas in which any "independent judgment" could be exercised and indicated that Commission rates carried "a presumption of validity." Since a court cannot exercise a truly independent judgment where a presumption of validity is involved, one must conclude that Ben Avon is considerably diluted by the Hope Gas decision. See also Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951). Probably the most recent decision on this point is to be found in the Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968) ("[T]he Natural Gas Act provides without qualification that the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' More important, we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts.").

10. Cities Serv. Gas Co. v. FPC, 329 U.S. 773 (1946), denying cert. to 155 F.2d 694 (10th Cir.).

resurrected. The state courts refer to it as a "dubious" or "discredited" doctrine but often apply it nonetheless, indicating their preference for letting the Supreme Court undo what it has created. Thus, the shadow of *Ben Avon* is perhaps more powerful than its substance. The resulting confusion is obviously undesirable and has had a deleterious effect on the finality and respect accorded to administrative and quasi-legislative rate-making proceedings. The time has come to finally bury *Ben Avon*. If this proves impossible, then it should at least be disregarded by the state courts as being little more than the fossilized remains of a once vital doctrine.

II. The New York Approach

The task of proving that a specific case has been implicitly overruled is not a simple one. It is the kind of topic about which reasonable men can often differ. However, if one were to hold an inquest into the suspected demise of *Ben Avon*, it would be found that most commentators have pronounced it dead, or at least dying.[11] More importantly, the courts have also adopted this posture with increasing frequency. A decision of great importance is the recent New York Court of Appeals decision in *Mount St. Mary's Hospital v. Catherwood*.[12] Judge Breitel, writing for the court, stated that "in [New York], the *Ben Avon* doctrine *was* once accepted and applied in a utility rate case."[13] This choice of language clearly implies that the doctrine is no longer accepted in New York. The use of the past tense may be construed as being equivalent to a statement by the court that "we no longer apply the *Ben Avon* doctrine in New York." Moreover, Judge Breitel made it clear that he was following what the court perceived to be the trend of judicial decisions when he noted that, "[a]lthough never overruled, this requirement of *de novo* review has evidently ebbed in the Federal courts, leaving as a residuum the substantial evidence test."[14] Since this is the most direct expression of the New York Court of Appeals on this question, it is at least an indication that the court might no longer follow its earlier holding in *Staten Island*

11. Professor Davis, perhaps the foremost authority on administrative law, has flatly stated that the "Ben Avon doctrine in the federal courts is dead." 4 K. Davis, supra note 8, § 29.09, at 174; see Benjamin, Judicial Review of Administrative Adjudication: Some Recent Decisions of the New York Court of Appeals, 48 Colum. L. Rev. 1, 30 (1948); 3 B.C. Ind. & Comm. L. Rev. 554, 556 (1962). See also 1 R. Benjamin, Administrative Adjudication in the State of New York 344 (1942). Some authors, however, believe that the Ben Avon doctrine still has some vitality. See Jaffe, supra note 4, at 984; Strong, The Persistent Doctrine of "Constitutional Fact", 46 N.C.L. Rev. 223 (1968).

12. 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970).

13. Id. at 504, 260 N.E.2d at 514, 311 N.Y.S.2d at 871 (citations omitted) (emphasis added).

14. Id. at 503-04, 260 N.E.2d at 513, 311 N.Y.S.2d at 870 (footnote omitted) (citation omitted).

Edison Corp. v. Maltbie.[15] In that case the court of appeals, relying heavily on *Ben Avon*, held that a utility might bring an action for injunctive relief where an article 78 proceeding would not adequately protect the utility's constitutional rights. Petitioner's theory in *Staten Island*, accepted by the majority of the court of appeals, was that the standard for review by way of certiorari was inadequate since no new trial and no new findings of fact would be possible but only a limited review based on the substantiality of the evidence. Judge Desmond, in a dissenting opinion in which he was joined by Judges Loughran and Fuld, noted:

> [P]laintiff has successfully maintained herein that, having adequately alleged unconstitutional confiscation of its property, its absolute right to procedural due process can be satisfied by nothing less than a separate, independent trial *de novo* by a court, of the same questions already litigated at length before the commission. If that be the law, a good many long, involved rate cases will have to have two trials each, and the first trial—before the commission—will be rather a footless and futile performance.[16]

While it would seem that the *Mount St. Mary's* case has overruled *Staten Island Edison Corp. v. Maltbie*, at least by implication, it would of course be more desirable, in terms of judicial certainty, for the court to directly abandon its old approach. Such an opportunity arose in the case of *New York Telephone Co. v. Public Service Commission*,[17] in which the appellate division indicated that *Ben Avon* was discredited and need not be followed. The court of appeals, while modifying the decision, did not criticize or reverse the appellate division on this point, thus indicating its tacit approval. Since *New York Telephone* provides an interesting model of the type of case in which the *Ben Avon* rule is often applied, it is discussed below in some detail.

III. The New York Telephone Company Case

On March 20, 1969, the New York Telephone Company (NYT) filed with the New York Public Service Commission (PSC) proposed rate adjustments which, if accepted, would have increased its annual revenues by approximately $175,000,000.[18] In applying for this increase, the company submitted abundant financial data relating to its earnings and expenses for the 1968 fiscal year, which was designated as the test year. This data, according to the company, indicated that existing rates were too low to supply the necessary revenues for a "fair rate of return."

15. 296 N.Y. 374, 73 N.E.2d 705 (1947).

16. Id. at 385, 73 N.E.2d at 709-10 (dissenting opinion).

17. 64 Misc. 2d 485, 315 N.Y.S.2d 327 (Sup. Ct. 1970), rev'd, 36 App. Div. 2d 261, 320 N.Y.S.2d 280 (3d Dep't), modified per curiam, 29 N.Y.2d 164, 272 N.E.2d 554, 324 N.Y.S.2d 53 (1971).

18. New York Tel. Co., Case 25155, at 3 (N.Y. Pub. Serv. Comm'n, July 1, 1970).

Pursuant to section 92 of the Public Service Law,[19] the proposed rate increase was suspended pending hearings by the PSC as to the necessity and reasonableness of the request. This was the inception of case 25155 before the Commission. Hearings were held for some 33 days and appearances were made by 71 persons representing such diverse interests as the PSC, the telephone company, the National Fire & Burglar Alarm Association, The Center on Social Welfare Policy and Law, and the Consumer Information Service. Numerous individual protestants also appeared; 5,275 pages of testimony were taken. On January 20, 1970, Commissioner Larken, who presided at the hearings, submitted to the Commission, his proposed report in which he recommended a rate increase which would yield $136,756,000 in additional revenues, substantially less than the increase sought by the company.[20] The Commission agreed that the original amount sought by the company was unreasonable and excessive and cancelled the proposed tariff. While the Commission did not adopt Larken's recommendation that an increase of $136,756,000 be granted, it did acknowledge that some increase was justified and indicated that it would entertain a new filing for an amount not exceeding that recommended by Commissioner Larken, and that such a filing might be made effective on an interim basis pending final determination. The company made a new filing and the interim rate went into effect on February 26, 1970.[21] After three months' experience with these new interim rates, NYT apparently discovered that the new rate of return fell short of its anticipations, and that the interim rate for which it had applied was in fact confiscatory. On June 16, 1970, the company filed a petition to reopen the record. In this petition the company claimed that it would need an additional $155,000,000 per year in revenues to earn a rate of return of 7.88 percent, supposedly an agreed-upon rate of "reasonable return."

On July 1, 1970, the petition to reopen the record was denied.[22] Moreover, the Commission issued its final order fixing rates which would yield additional revenues of only $104,965,000 annually[23] and directed the company to refund to its customers the excess collected under the interim rate.[24]

On September 1, 1970, the Commission issued its opinion on the motion to reopen the proceeding and, by a 3-2 decision, denied a rehearing. However, an adjustment of approximately $15,000,000 was made so as to

19. N.Y. Pub. Serv. Law § 92 (McKinney Supp. 1970).

20. New York Tel Co., Case 25155, at 4-5 (N.Y. Pub. Serv. Comm'n, July 1, 1970).

21. Id.

22. Order, New York Tel. Co., Case 25155, at 3 (N.Y. Pub. Serv. Comm'n, July 1, 1970).

23. Id. at 2.

24. Id. at 3.

allow NYT to file for new rates yielding $120,797,000. In denying the motion to reopen the proceeding the Commission noted:

> If NYT believes that its rates are inadequate it should file promptly for whatever relief it believes it can justify under the changed conditions. Administrative proceedings must come to an end. . . . Reopening of this proceeding is not a sensible alternative.[25]

Two Commissioners, dissenting, favored a reopening of the proceeding but with no rate increase until the evidence was reviewed.

It was at this point that proceedings at special term[26] were instituted by NYT. The company simultaneously brought an equitable action to enjoin the Commission from interfering with the company's original proposed rate increase coupled with a proceeding in the nature of certiorari under article 78 of the New York Civil Practice Law and Rules to review the actions of the PSC. A stay delaying the effective date of the Commission's final order reducing the rates was also requested and granted.

On November 3, 1970, Judge Kane of the supreme court handed down his decision granting the preliminary injunction,[27] relying on the *Ben Avon* and *Staten Island* cases and exercising his independent judgment on both the facts and the law. Judge Kane apparently had some reservations concerning the continuing vitality of the *Ben Avon* rule and noted that "[t]his Court of Appeals decision [*Staten Island Edison Corp. v. Maltbie*] has never been overruled although the once accepted doctrine upon which it was based . . . has been cast in doubt."[28] The court also noted that the recent court of appeals decision in the *Mount St. Mary's* case spoke of the " 'now dubious rule in the *Ben Avon* and *Staten Island* cases',"[29] but concluded that

> the doubt cast cannot be considered tantamount to an overruling of the law of that case.
>
> Furthermore, if the *Staten Island* case is to be overruled, it should be done by the Court of Appeals and not by this court.[30]

Thus, Judge Kane cautiously adhered to the decaying *Ben Avon* doctrine, leaving the constitutional question to be decided by the higher courts.

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25. New York Tel. Co., Case 25155, at 15 (N.Y. Pub. Serv. Comm'n, Sept. 1, 1970) (citation omitted).

26 64 Misc. 2d 485, 315 N.Y.S.2d 327 (Sup. Ct. 1970), rev'd, 36 App. Div. 2d 261, 320 N.Y.S.2d 280 (3d Dep't), modified per curiam, 29 N.Y.2d 164, 272 N.E.2d 554, 324 N.Y.S.2d 53 (1971).

27. The article 78 proceeding was transferred directly to the appellate division pursuant to N.Y. C.P.L.R. § 7804(g) (McKinney 1963).

28. 64 Misc. 2d at 488, 315 N.Y.S.2d at 329 (citations omitted).

29. Id., citing Mount St. Mary's Hosp. v. Catherwood, 26 N.Y.2d 493, 509, 260 N.E.2d 508, 517, 311 N.Y.S.2d 863, 875 (1970).

30. 64 Misc. 2d at 488-89, 315 N.Y.S.2d at 330 (citations omitted).

On appeal, the appellate division reversed, and in doing so flatly rejected the *Ben Avon* doctrine.[31]

The court of appeals, although modifying the decision on the merits, left intact the appellate division's finding that judicial review should be limited to the narrow scope of article 78 of the New York Civil Practice Law and Rules. The decision represents a new awareness by the state appellate courts that the *Ben Avon* doctrine can no longer be swept under the carpet, but must be dealt with forthrightly. The *New York Telephone* case itself is a classic. It graphically illustrates the pernicious effects of the *Ben Avon* rule. A complex rate determination was made by the Public Service Commission, a body possessed of great expertise which has been entrusted by the legislature with the power to balance the needs of the utilities against those of the public. Thirty-three days of hearings were held, 5,275 pages of testimony were elicited, and then, after an analysis of countless pages of statistics and economic data, a decision was reached. If the decision were favorable to the utility, the matter might well have ended there. However, should the utility be dissatisfied, as in this case, they need only cry "confiscation" and proceed to obtain another determination of the question de novo under the guise of constitutional due process. The result is that a lone judge must substitute his independent judgment on both questions of fact and law for that of the members of the Public Service Commission.

Of course, there must be some judicial review of quasi-legislative rate-making to insure against arbitrary action. However, the existing procedures for limited review that exist in the majority of jurisdictions are sufficient to prevent abuses. Such review is generally limited to the "substantial evidence test" and permits the courts to scrutinize the ad-

31. The appellate division, following the approach recommended in this article, reversed the injunction issued by the trial court, New York Telephone Co. v. Public Serv. Comm'n, 36 App. Div. 2d 261, 320 N.Y.S.2d 280 (3d Dep't 1971). In a notable and courageous decision, Judge Simons, writing for the court, observed that "there are sound and persuasive reasons" for not following Staten Island Edison Corp. v. Maltbie, decided by the court of appeals in 1947. Id. at 265, 320 N.Y.S.2d at 284. He noted that "[t]he holding of Staten Island was necessitated by strict adherence to the Supreme Court's rule in the Ben Avon case decided in 1920, a rule which that court itself has all but ignored and which it has cited only once in a rate case since it was handed down." Id. (italics omitted) Judge Simons observed that the courts seem to have come "full circle" from a pre-Ben Avon rule, requiring only limited review by certiorari in rate cases. He noted that "[r]ecent Supreme Court holdings are more consistent with these decisions than with the Ben Avon case." Id. at 267, 320 N.Y.S.2d at 286 (italics omitted). In discussing the important policy reasons for eliminating the Ben Avon rule, Judge Simons concluded: "The time consumed, the expense involved, the cumbersome procedures, and the loss of public confidence in administrative agencies all militate against the maintenance of a dual system of determining the issues in rate cases." Id. at 267-68, 320 N.Y.S.2d at 286.

ministrative decision without completely disregarding it. This form of review by certiorari is more than adequate to prevent capricious administrative action and can insure compliance with procedural due process. The only difference is that the courts, rather than determining if the "correct" or "optimum" rate was reached, defer to the expertise of the rate-making body and merely pass upon whether there was substantial evidence in the record to support the administrative agency's decision.

The recent cases in New York indicate a desire to acknowledge the demise of the *Ben Avon* doctrine. In other states a variety of patterns have emerged. At least one state, Alaska, has flatly condemned the rule.[32] Another group of states, while perhaps paying lip service to the rule, have either applied the substantial evidence or reasonableness tests in most cases or exercised independent judgment only in extreme cases.[33] Finally, there are those jurisdictions which have continuously followed *Ben Avon*.[34] A few states, such as Texas, seem to have been inconsistent in their approach, perhaps indicating some confusion over the application and vitality of the rule.[35] California has incorporated the *Ben Avon* case into its statutes practically verbatim.[36] Nevertheless, the California

32. Keiner v. City of Anchorage, 378 P.2d 406 (Alas. 1963). "Although the Ben Avon doctrine has never been expressly overruled, it no longer appears to have any vigor as a principle of constitutional law." Id. at 409 n.6.

33. E.g., Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 294 P.2d 378 (1956); Arkansas Power & Light Co. v. Arkansas Pub. Serv. Comm'n, 226 Ark. 225, 289 S.W.2d 668 (1956); In re Pacific Tel. & Tel. Co., 71 Idaho 476, 233 P.2d 1024 (1951); Southern Bell Tel. & Tel. Co. v. Louisiana Pub. Serv. Comm'n, 232 La. 446, 94 So. 2d 431 (1957); Minneapolis St. Ry. v. City of Minneapolis, 251 Minn. 43, 86 N.W.2d 657 (1957); State ex rel. Rice v. Public Serv. Comm'n, 359 Mo. 109, 220 S.W.2d 61 (1949); State Corp. Comm'n v. Mountain States Tel. & Tel. Co., 58 N.M. 260, 270 P.2d 685 (1954); San Juan Coal & Coke Co. v. Santa Fé, S. J. & N. Ry., 35 N.M. 512, 2 P.2d 305 (1931); Mount Vernon Tel. Corp. v. Public Util. Comm'n, 163 Ohio St. 381, 127 N.E.2d 14 (1955); United Elec. Rys. v. Kennelly, 80 R.I. 64, 90 A.2d 775 (1952).

34. E.g., Alabama Pub. Serv. Comm'n v. Southern Bell Tel. & Tel. Co., 253 Ala. 1, 42 So. 2d 655 (1949); Georgia Pub. Serv. Comm'n v. Atlanta Gas Light Co., 205 Ga. 863, 55 S.E.2d 618 (1949); Sizemore v. Public Serv. Comm'n, 133 Ind. App. 51, 177 N.E.2d 743 (1961); Central Me. Power Co. v. Public Util. Comm'n, 156 Me. 295, 163 A.2d 762 (1960); Opinion of the Justices to the House of Representatives, 328 Mass. 679, 106 N.E.2d 259 (1952); Pacific Tel. & Tel. Co. v. Hill, 229 Ore. 437, 365 P.2d 1021 (1961); Southern Bell Tel. & Tel. Co. v. Tennessee Pub. Serv. Comm'n, 202 Tenn. 465, 304 S.W.2d 640 (1957); State ex rel. Pac. Tel. & Tel. Co. v. Department of Pub. Serv., 19 Wash. 2d 200, 142 P.2d 498 (1943).

35. Compare Marrs v. Railroad Comm'n, 142 Tex. 293, 177 S.W.2d 941 (1944), with Trapp v. Shell Oil Co., 145 Tex. 323, 198 S.W.2d 424 (1946).

36. See Cal. Pub. Util. Code § 1760 (West 1956).

Supreme Court has taken pains to indicate that this does *not* require de novo review of all questions of law and fact.[37]

The lower federal courts have not considered the doctrine very often in recent years, perhaps because statutory provisions providing for review of federal administrative action have become so thorough. Nevertheless, at least one federal district court has recently indicated that the *Ben Avon* case is of little significance today.[38]

IV. Conclusion

It is clear, from the author's viewpoint, that the *Ben Avon* doctrine is an undesirable one. It may be inferred that the Supreme Court concurs in this judgment, since it has failed either to reaffirm or to follow it without some modification. Moreover, it has chosen to ignore *Ben Avon* altogether with remarkable frequency. Perhaps, as Professor Jaffe has noted, the Court has "concluded that it would be wise to retain the case in its armory of implements against the day when some exceptional situation might demand its application."[39] However, the Supreme Court is not, and should not be, a depository of rusty weapons which can sporadically be requisitioned to slay unsuspecting litigants. The Supreme Court should seize upon the first opportunity to repudiate the *Ben Avon* doctrine or, at the very least, to clarify it in view of subsequent cases that have eroded its impact. Absent an explicit repudiation, state courts should follow the approach of the Appellate Division of the New York Supreme Court, and thus depart from the doctrine on the theory that it has been overruled sub silentio.

37. See Southern Pac. Co. v. Public Util. Comm'n, 41 Cal. 2d 354, 260 P.2d 70 (1953), appeal dismissed per curiam, 346 U.S. 919 (1954). Colorado, which also has a statute requiring the exercise of independent judgment by the courts, also seems to have mitigated this requirement by judicial fiat. See Public Util. Comm'n v. Northwest Water Corp., 168 Colo. 154, 451 P.2d 266 (1969).

38. New York, N.H. & H.R.R. v. United States, 289 F. Supp. 418 (S.D.N.Y. 1968). The three judge district court noted that it is unclear whether Ben Avon would be "read today as requiring a more intensive judicial scrutiny than is generally employed in judicial review of agency decisions." Id. at 427 n.5.

39. Jaffe, supra note 4, at 984.