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Administrative Law -- Criminal Law -- Powers of Administrative Boards

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NOTES AND COMMENTS

Administrative Law—Criminal Law—Powers of Administrative Boards

By North Carolina statute[1] any District Health Board was given authority to "make such rules and regulations, . . . and enforce such penalties as in its judgment shall be necessary to protect and advance the public health." One of the Boards provided[2] that for the violation of its various ordinances the court should have power to punish by fine, imprisonment, or both. In reversing a conviction under a Health Board ordinance making it unlawful to sell milk in the District without a permit, the court said that if the Board were authorized by statute to make both the regulation and the penalty "it would run counter to the principle that the legislature cannot delegate its power to make a law."[3]

This case opens an inquiry as to what administrative boards are permitted to do in the field of criminal law. Approaching the problem logically the questions that may be raised are: (1) whether the administrative board acted within its statutory authorization, and, if so, (2) is the statute under which it acted valid. The first question is one of statutory construction and will not be discussed in detail here.[4] The attitude of the majority of courts has been that when there is criminal liability attached, the regulation should clearly be warranted by the legislative act.

The second question may be divided into four types of problems: (A) Was the administrative body legally given authority to make the regulation? (B) Did the legislature say that the violation of the regulation was to be a crime or was authority to do this given to the administrative agency? (C) Did the legislature fix the penalty or did it authorize the administrative agency to do so? (D) Was it the court or the administrative body which was authorized to determine guilt or innocence and assess the penalty?

(A) This problem involves the constitutionality of legislation authorizing the administrative body to make rules and regulations for carrying out a statute. Except as to municipal corporations, most of the courts adhere to the theory that under the doctrine of separation of powers a true legislative function cannot be delegated; but they feel that admin-

[1] N. C. GEN. STAT. §130-66(4) (1945 Supp.).
[2] §16, Public Health Service Ordinance of the District Board of Health of the Counties of Burke, Caldwell, and McDowell.
[3] State v. Curtis, 230 N. C. 169, 52 S. E. 2d 364 (1949).
[4] See Schwenk, *The Administrative Crime*, 42 MICH. L. REV. 51, 66 (1943).

istrative authority to make regulations is not such a function.[5] If the act which gives the right to make the regulations sets forth the legislative policy and the general standards for the administrative body to follow, it will be called either no delegation of legislative power[6] or a constitutional delegation.[7] Although the test which the legislative act must meet is not always stated the same way,[8] the decisions have uniformly upheld the act when sufficient standards were provided.

Since the result of a case may depend on whether or not the court finds there has been a delegation of legislative power, it is best to realize that there are, in effect, two types of legislative power—one to determine policies and the other to fill in details. When courts say that legislative functions are non-delegable they are thinking of the former; then in an attempt to reconcile these statements on non-delegability with the need for administrative regulations, they have often said that the latter power is one that is not legislative. But administrative regulations, which have the force and effect of law, are certainly substantially the same as legislation. The Wisconsin court made a clear analysis of the situation, saying, in part, "When, however, the Legislature has laid down these fundamentals of a law [its general purpose or policy and the limits of its operation], it may delegate to administrative agencies the authority to exercise such legislative power as is necessary to carry into effect the general legislative purpose; . . . . It only leads to confusion and error to say that the power to fill up the details and promulgate rules and regulations is not legislative power."[9]

The fact that the violation of the regulations will be a crime does not seem to vary the approach of a court in determining whether regulations can be made under a particular statute. Although aware that the regulations define the elements of a crime, the courts usually discuss the authority to make regulations in the same manner as they do when there is a civil penalty, adding only that a criminal penalty for the violation does not change the result. A leading illustration of this is

[5] Yakus v. United States, 321 U. S. 414 (1944).

[6] United States v. Grimaud, 220 U. S. 506 (1910); United States v. Tishman, 99 F. 2d 951 (7th Cir. 1938), *cert. denied*, 306 U. S. 636 (1939); State v. Dudley, 182 N. C. 822, 109 S. E. 63 (1921).

[7] Lotto v. United States, 157 F. 2d 623 (8th Cir. 1946); Oklahoma v. U. S. Civil Service Commission, 153 F. 2d 280 (10th Cir. 1946), *aff'd*, 330 U. S. 127 (1947).

[8] (1) The legislature can make a law to delegate a power to determine some facts or state of facts upon which the law makes, or intends to make, its own action depend. United States v. Grimaud, 220 U. S. 506 (1910); State v. Curtis, 230 N. C. 169, 52 S. E. 2d 364 (1949). (2) After declaring its policy and fixing a primary standard, the legislature may leave the administrative officers power to fill up the details by prescribing rules. Panama Refining Co. v. Ryan, 293 U. S. 388 (1935); Motsinger v. Perryman, 218 N. C. 15, 9 S. E. 2d 511 (1940).

[9] State *ex rel.* Wisconsin Inspection Bureau v. Whitman, 196 Wis. 472, 505, 220 N. W. 929, 941 (1928).

United States v. Grimaud,[10] wherein Congress had set the standards within which the Secretary of Agriculture could make regulations to preserve the forests and had declared that violations of the regulations would result in criminal liability. The Supreme Court, in upholding the defendants' conviction over the objection that it was unconstitutional for an administrative board to declare what should be a crime, said: ". . . nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense." North Carolina has not altered its decisions as to the validity of the grant of regulation-making power by reason of the fact that violation of the regulations is a crime.[11]

(B) It is the normal procedure for a legislature to declare that any violations of the administrative regulations will be a crime, and there is no question as to the validity of this. This method was approved in the *Grimaud* case where the Court relied heavily on the point that Congress, rather than the administrative officer, had said that the failure to obey the regulations would be a crime.

On the other hand, the authorities agree that it is unconstitutional for the legislature to give an administrative agency power to decide whether actions contrary to its rules should be crimes. In *People v. Grant*[12] the legislature said that the violation of any rule of the state alcoholic board should be a misdemeanor if such rule so provided. In reversing the defendant's conviction for one of these administratively created crimes the court said: "The declaration of the crime and the prescription of the penalty for the violation rest in the ultimate discretion of the Legislature." The same view was adopted by the California court[13] which said in a suit against a port authority that "no such board or commission may declare a violation of such rules or regulations . . . to be a crime."

A method by which an administrative board may be given a share in prescribing what shall be a crime is to grant it the power to dispense with or suspend the operation of a law.[14] In doing this the crime is set forth by the legislature and the only power given to the agency is the discretion to say when or upon what conditions it shall be enforced. Such a power in an agency is not considered in the same category as the making of a crime; therefore it is permitted when there is a sufficient standard to control the agency's discretion.

[10] 220 U. S. 506 (1910). Discussed in 1 N. C. L. REV. 50 (1922).

[11] State v. Dudley, 182 N. C. 822, 109 S. E. 63 (1921); State v. Hodges, 180 N. C. 751, 105 S. E. 417 (1920); State v. R. R., 141 N. C. 846, 54 S. E. 294 (1906); Express Co. v. R. R., 111 N. C. 463, 16 S. E. 393 (1892).

[12] 242 App. Div. 310, 275 N. Y. S. 74 (3d Dep't. 1934), *aff'd*, 267 N. Y. 508, 196 N. E. 553 (1935).

[13] Gilgert v. Stockton Port District, 7 Cal. 2d 384, 60 P. 2d 847 (1936).

[14] 87 U. OF PA. L. REV. 201 (1938) contains a discussion of this power in various fields.

(C) Closely related to the problem of making the violation of a regulation a crime is that of determining the penalty for a violation. The usual legislative act includes the penalties along with the statement that violations of the regulations are to be crimes, and there is no question as to the legality of this technique. On the issue of whether administrative boards can set the penalties there has been little litigation, and much of that has dealt with civil rather than criminal penalties.[15] The cases on administrative determination of civil penalties are important because the same court would probably have a stricter attitude toward permitting steps which would subject a person to criminal punishment.

In a California case[16] the board had been empowered to set penalties, not exceeding a certain amount per violation, for disobedience of its rules and regulations. The court held that although the board could make regulations, "the penalty for the violation of such rules and regulations is a matter purely in the hands of the legislature." The fact that there was a maximum set by the legislature did not alter the opinion of the court.

In *Zuber v. Southern R. R.*[17] the Georgia Court of Appeals undertook to interpret an earlier opinion of the Georgia Supreme Court[18] which had approved the fixing of civil penalties by an administrative agency. It said that the supreme court must have felt that the legislative act with which it was faced made it mandatory for the agency to provide penalties for the disobedience of its regulations, and that therefore the agency was doing what was merely an administrative action when it determined the amount of these penalties. Nevertheless, the court of appeals thought that unless the legislature had given at least a general sanction to the prescription of civil or criminal penalties, no administrative board could take steps to prescribe them. It recognized that even with the legislative directive the supreme court's decision was an extension of the *Grimaud* doctrine.

In the instant case[19] the legislature did not specify either that the violation of the regulations was to be a crime or that certain penalties were to be imposed for a violation; and since these determinations were left to the discretion of the administrative board, the decision reversing the conviction is in accord with the authorities above discussed. These defects had been remedied by the legislature after the conviction below, but the court would give no indication as to the result under the new statute.

[15] The language of the *Grant* case, quoted in the previous section, indicates that the prescribing of a criminal penalty is considered to be a legislative function.
[16] Board of Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491. 26 Pac. 375 (1891).
[17] 9 Ga. App. 539, 71 S. E. 937 (1911).
[18] Southern R. R. v. Melton, 133 Ga. 277, 65 S. E. 665 (1909).
[19] State v. Curtis, 230 N. C. 169, 52 S. E. 2d 364 (1949).

(D) The determination of guilt and the imposition of punishment for a crime are ordinarily done by the courts, with the administrative board only instigating the prosecution of the defendant for the violation of its rules and regulations. Whether or not an administrative board will be permitted to impose a criminal penalty seems to depend on whether the penalty is one that is flexible or inflexible. When an administrative agency is given power to impose an inflexible penalty, it amounts to nothing more than its ordinary process of finding the facts and determining whether there has been a violation. The Supreme Court has given its approval to the adminstrative imposition of this type penalty.[20] On the other hand, a flexible penalty was held unconstitutional in *Wong Wing v. United States*,[21] where the Commissioner of Immigration placed a punishment upon the defendant in addition to ordering him to be deported. In *Tite v. State Tax Commission*,[22] where the problem was considered at length, the Utah court said that it was permissible for an administrative board to impose a set penalty, but not a discretionary one. If a board does undertake to hear a case its procedure must meet the constitutional requirement of due process.[23]

Today administrative boards are given the right to impose many civil penalties which are in effect the same or worse than criminal ones. A fine brings an equivalent result whether levied by a board or a court, and a license revocation by a board is often more damaging than a court fine would be. A striking example of a civil penalty having the effect of a criminal one is *Helvering v. Mitchell*,[24] where a taxpayer had to pay a fraud penalty although he had previously been acquitted on criminal charges of willfully attempting to evade the income tax. When a revenue officer determines that there has been fraud or the like, he is doing something which is thought of as judicial, yet the courts have not balked at permitting such determinations. Likewise in workmens' compensation statutes there is often authorization for the board to impose penalties to facilitate the functioning of the act.[25] To public utilities commissions, immigration officials, the Securities and Exchange Commission, etc., are given broad powers to impose monetary penalties for failure to obey the statutes and rules. Since an administrative agency will be cognizant of the forces at work in its field, it should be able to do an intelligent job of imposing the necessary penalties.

[20] Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320 (1909); Passavant v. United States, 148 U. S. 214 (1892); Bartlett v. Kane, 16 How. 263 (1853).

[21] 163 U. S. 228 (1895).

[22] 89 Utah 404, 57 P. 2d 734 (1936).

[23] Morgan v. United States, 304 U. S. 1 (1938); National Labor Relations Board v. Prettyman, 117 F. 2d 786 (6th Cir. 1941).

[24] 303 U. S. 391 (1938).

[25] N. C. GEN. STAT. §§97-18(e), 92(e) (1943); GELLHORN, ADMINISTRATIVE LAW CASES AND COMMENTS 334 (2d ed. 1947).

Notwithstanding the fact that they may validly be given authority to impose penalties, administrative boards have not yet been given the power to order imprisonment. There is little need for administrative boards to operate in this area, and public opinion would be strongly against executive officials prescribing such punishment.[26] In the *Wong Wing* case[27] the Court felt that a person should have a judicial trial before he could be punished by having his liberty taken away.

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Corporations—Foreign—Suability After Dissolution

Under the common law the dissolution of a corporation extinguished its debts, actions against it were abated, its real property reverted to its grantors, and its personal property escheated to the King.[1] The event was likened to the death of a natural person.[2] This rule was tolerated so long as there were only municipal, ecclesiastical, and eleemosynary corporations in existence. But with the growth of business corporations, accompanied by their shareholders and creditors, the harshness of such a rule was manifest, and the equity courts were persuaded that the assets of a dissolved corporation should be declared a trust fund for the satisfaction of claims by creditors and other interested parties.[3] A later development was the almost universal adoption of statutes which extended the life of a corporation after dissolution so that it could bring and defend actions in the corporate name for the purpose of "winding up" its affairs.[4]

But extension statutes have not been completely effective, for much confusion still exists when an action is brought involving as a party a foreign corporation which has been dissolved by the state which created it. In such a case the general rule is said to be that the law of the creating state governs, and that when the corporation's very existence is terminated by the state of domicile it cannot be a party to a suit elsewhere.[5] Similarly, if the law of the creating state extends the life of the corporation after dissolution for a winding up period, it may generally sue or be sued in other jurisdictions because it still exists as an entity for that purpose.[6] On the other hand, these extensions may be

[26] GELLHORN, *op. cit. supra note* 25, 348.
[27] 163 U. S. 228 (1895).

[1] See Life Ass'n. of America v. Fassett, 102 Ill. 315 (1882); 2 BEALE, CONFLICT OF LAWS 742 (1935); 17 FLETCHER CYCL. CORP. 775 (1942); Note, 97 A. L. R. 483 (1935).
[2] See Chicago Title Co. v. Wilcox Bldg. Corp., 302 U. S. 120, 124 (1937).
[3] Marcus, *Suability of Dissolved Corporations*, 58 HARV. L. REV. 675 (1945).
[4] 16 FLETCHER CYCL. CORP. 930 (1942).
[5] 2 BEALE, *op. cit. supra* note 1, at 742; Note, 47 A. L. R. 1288, 1557 (1927).
[6] Harris-Woodbury Lumber Co. v. Coffin, 179 Fed. 257 (W. D. N. C. 1910), *aff'd*, 187 Fed. 1005 (4th Cir. 1911).