Volume 49 | Number 4 Article 21

6-1-1971

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Kenneth C. Day

courts are especially appropriate, and its elimination would have no significant impact on the workload of the federal courts.[70]

Finally, the rule suggested offers an opportunity to settle this area of conflict quickly and with certainty. As Justice Brandeis once remarked, "in most matters it is more important that the applicable rule be settled than that it be settled [correctly] . . . ."[71] The Supreme Court should take advantage of one of the opportunities certain to arise to establish a definite rule. And if it fails to do so, Congress should.

R. B. TUCKER, JR.

Municipal Corporations—Public Purpose—Taxation and Revenue Bonds to Finance Low-Income Housing

In *Martin v. North Carolina Housing Corp.*[1] the North Carolina Supreme Court upheld the statute establishing the Housing Corporation as a "public agency . . . empowered to act on behalf of the State . . . for the purpose of providing residential housing 'for sale or rental to persons and families of lower income.' "[2] In so holding, the court resolved in favor of the Housing Corporation challenges regarding public purpose, lending of credit, creation of debt, delegation of legislative authority, and property tax exemption, arising under various sections of the North Carolina Constitution.[3]

The dissent singled out the noteworthy holdings of the case: public purpose and tax exemption. In the latter regard the court in *Martin* upheld the statutory tax exemption of the bonds to be issued by the Housing Corpo-

[70] *Id.*

[71] Burnet v. Coronado Oil & Gas, 285 U.S. 393, 406 (1932).

[1] 277 N.C. 29, 175 S.E.2d 665 (1970).

[2] *Id.* at 34, 175 S.E.2d at 667. The Housing Corporation was to issue self-liquidating, tax-exempt revenue bonds and use the proceeds to purchase federally insured mortgage and construction loans. The Housing Corporation would also establish a housing development fund with grants and loans from industry, foundations, and government to be used for project development loans, downpayment assistance to needy families, and uninsured loans to builders and developers for land development and residential construction. N.C. GEN. STAT. §§ 122A-1 to -23 (Supp. 1969).

[3] N.C. CONST. art. V, § 3, limiting the power of taxation to public purposes; art. VII, § 6, limiting the power of a municipal corporation to pledge its faith; art. V, § 4, limiting the power of the General Assembly to lend the credit of the State; art. I, § 8, defining the separation of the powers of government; and, art. V, § 5, defining the scope of the exemption of property from taxation.

ration. Article V, section 5 of the North Carolina Constitution provides that "[p]roperty belonging to the State, counties and municipal corporations shall be exempt from taxation," and that the General Assembly may exempt certain enumerated properties, but does not include in the list bonds issued by the state or an agency of the state. The majority, in finding the exemption permissible,[4] simply reaffirmed *State Education Assistance Authority v. Bank of Statesville*,[5] in which the court had held that the General Assembly could exempt revenue bonds from taxation by the state and its subdivisions "[s]ince the tax-exempt feature makes possible a more favorable sale of revenue bonds and thereby contributes substantially to the accomplishment of the public purpose for which they are issued."

The dissent noted that the court previously had upheld the exemption of state, county, and municipal bonds on the rationale that the exemption would reduce the interest that the issuer would have to pay on the bonds and thus achieve approximately the same effect as if the bonds were taxed and the higher interest paid. Since these were revenue bonds and *not* obligations of the state, the dissent argued that such reasoning did not apply in this case.[6] However, as in previous cases,[7] the promotion of the public purpose of the organization issuing the bonds was a dispositive factor. The court in *Martin* thus reinforces the exemption of bonds issued by state agencies not merely where the savings in interest will accrue directly to the state, but also where it serves to advance the public purpose of the particular program.

On the issue of public purpose, the court took notice of the legislative findings of a shortage of decent, safe, and sanitary housing for low-income families, and the inability of the private sector to meet the need;[8] it further noted the authority of the General Assembly to legislate for "the protection of the public health, safety, morals and general welfare of the people."[9] By having more decent housing, the court reasoned, families and persons of low income, who might not otherwise obtain such accommodations, would acquire a stake in the preservation of society and

[4] 277 N.C. at 57-58, 175 S.E.2d at 681-82.
[5] 276 N.C. 576, 589, 174 S.E.2d 551, 560 (1970).
[6] 277 N.C. at 65, 175 S.E.2d at 686. *See also* Pullen v. Corporation Comm'n, 152 N.C. 548, 565, 68 S.E. 155, 163 (1910) (dissenting opinion).
[7] State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 589, 174 S.E.2d 551, 560 (1970); Webb v. Port Comm'n of Morehead City, 205 N.C. 663, 674-75, 172 S.E. 377, 383 (1934).
[8] 277 N.C. at 49, 175 S.E.2d at 676.
[9] *Id.* at 45, 175 S.E.2d at 674.

institutional stability. On this basis the activities of the Housing Corporation were found to be for a public purpose.[10]

Implicit in the "spirit of American Constitutions" is the idea that the government shall always confine itself to the proper business or function of government.[11] Thus, in finding the activities of the Housing Corporation to be within the ambit of public purpose, the court considered them to embody a proper object of government.[12] This general limit on the activities of government is defined by the scope of the three major forms of governmental power: the power to tax for public purposes,[13] specifically limited in the North Carolina Constitution;[14] the power of eminent domain for public uses;[15] and the police power for promoting the public health, safety, morals, and general welfare.[16] The definition of the proper function of government is dependent also upon changing times and conditions.[17] Since the three powers all relate to the proper conduct of the business of government, and are so interrelated, an evaluation of the realm of public purpose requires an examination of the definition of governmental function in all three areas.

Types of activities which at some time had been held by the North Carolina courts to embrace a public purpose were listed by one writer in 1947 to include the following: "aid to railroads, aid to establish a teachers training school, railway terminal facilities, public auditorium, World War I Veteran's Loan Fund, the state fair, a park, a municipal hospital, an airport, port terminal facilities, public housing authority under federal housing acts, playgrounds and recreational facilities, public libraries, and schools."[18] Subsequently the North Carolina Supreme Court has ruled within the ambit of public purpose the expenditure of tax revenues by a municipality for a policeman to attend a training course,[19] a voter-approved sale of municipal bonds for the construction of an armory outside the

[10] *Id.* at 49-50, 175 S.E.2d at 677.

[11] 38 AM. JUR. *Municipal Corporations* § 395 (1941).

[12] The North Carolina Supreme Court has held a tax to be for a public purpose if it is for the support of a recognized object of government. Green v. Kitchin, 229 N.C. 450, 455, 50 S.E.2d 545, 549 (1948).

[13] 51 AM. JUR. *Taxation* §§ 6, 321, 326 (1944).

[14] N.C. CONST. art. V, § 3.

[15] 26 AM. JUR. 2d *Eminent Domain* § 25 (1966).

[16] State v. Brown, 250 N.C. 54, 56, 108 S.E.2d 74, 76 (1959).

[17] Fawcett v. Town of Mt. Airy, 134 N.C. 125, 45 S.E. 1029 (1903). *See also* Albritton v. City of Winona, 181 Miss. 75, 178 So. 799, *appeal dismissed*, 303 U.S. 627 (1938).

[18] Note, *Municipal Corporations—Taxation—Meaning of Public Purpose*, 25 N.C.L. REV. 504, 506 (1947) (numbering omitted).

[19] Green v. Kitchin, 229 N.C. 450, 50 S.E.2d 545 (1948).

corporate limits,[20] municipal revenue bonds for the purchase of a lake and a generating plant,[21] and a state revenue-bond issue for loans to residents of slender means to facilitate their post-secondary education.[22]

However, the court has declined to include within the scope of public purpose activities less directly related to the function of government or representing a greater intrusion into the private sector. In *Nash v. Town of Tarboro*[23] the court rejected the levy of tax and issue of bonds for the construction of a hotel, feeling that such public benefits as might accrue would be "too incidental to justify the expenditure of public funds." An appropriation of municipal tax revenues to a Chamber of Commerce to be spent at its discretion to encourage industrial plants to locate near the city was struck down by the court in 1923 on the ground that the members of the Chamber of Commerce exercise no governmetal duty.[24] Nearly forty years later the court found a sufficient public purpose in a municipal appropriation to the Chamber of Commerce to advertise advantages of the city.[25] However, the court limited its approval to the use of nontax revenues and took emphatic note of the provisions for an advance budget to insure that the advertising would promote the general welfare of the city. In summary, while the court has recognized a wide range of government functions and approved activities pursuant thereto as being for a public purpose, it has exerted restraint on intrusions into the private sphere to compete with or to aid particular business ventures.

This reluctance to intrude into the private sector is reflected in *Mitchell v. North Carolina Industrial Development Financing Authority*,[26] relied upon by the plaintiff in *Martin*. The plaintiff in *Mitchell* had sued to enjoin the expenditure of the tax funds allocated to the Authority. Asserting that "for a use to be public . . . the ultimate net gain or advantage must be the public's as contradistinguished from that of an

[20] Morgan v. Town of Spindale, 254 N.C. 304, 118 S.E.2d 913 (1961).

[21] Keeter v. Town of Lake Lure, 264 N.C. 252, 141 S.E.2d 634 (1965). The acquisition of the property was to preserve the existence of a town that was dependent upon the tourist trade attracted to the lake.

[22] State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970).

[23] 227 N.C. 283, 289-90, 42 S.E.2d 209, 214 (1947).

[24] Ketchie v. Hedrick, 186 N.C. 392, 119 S.E. 767 (1923).

[25] Dennis v. City of Raleigh, 253 N.C. 400, 116 S.E.2d 923 (1960).

[26] 273 N.C. 137, 159 S.E.2d 745 (1968). The Authority was established to promote industry, increase employment, and advance the economy by providing facilities for private operators for industrial and research pursuits. Revenue bonds were to be issued for particular projects and the constructed facilities were then leased to private interests. *Id.* at 138-39, 159 S.E.2d at 746-47.

individual or private entity,"[27] and citing *Nash* for the proposition that it is not the function of government to engage in private business, the court in *Mitchell* held that the function of the Authority—acquiring sites and equipping facilities for private industry—was not a public purpose.[28]

The scope of governmental function found in public purpose has its counterpart in the public-use requirement for the exercise of the power of eminent domain. In *Mitchell* the court acknowledged that "'[f]or the most part the term "public purpose" is employed in the same sense in the law of taxation and in the law of eminent domain.'"[29] This view comes in the context of two basic meanings ascribed to public use: public employment and public advantage. While the traditional meaning of public use has been "use by the public," the trend, as reflected in the dictum in *Mitchell*, has been toward a liberalized view embracing "advantage to the public."[30] For example, the court has upheld a condemnation proceeding for an access road to a large private business on the basis that the road would be used by a substantial number of people to reach their place of work or to transact business.[31] One comment writer suggests that this holding emphasized the "public benefit" test of public use for eminent domain.[32]

Since a public "purpose" for eminent domain is generally one for which taxes may also be levied,[33] the activities of the Housing Corporation in *Martin* may profitably be compared with those of housing authorities and redevelopment commissions whose exercise of the power of eminent domain has been sustained. In these areas, however, the government exercise of eminent domain power is affected by the scope of its

[27] 273 N.C. at 144, 159 S.E.2d at 750.

[28] *Id.* at 159, 159 S.E.2d at 761. *Contra,* Albritton v. City of Winona, 181 Miss. 75, 178 So. 799 (1938), *noted in* 20 VAND. L. REV. 685 (1967). Here the plaintiff taxpayer objected to the issue of bonds and the levy of a tax approved by the voters of the city for the acquisition of land and construction of plants to be leased to new industries. The court held that the authorizing statute sought to promote the public welfare since its aims were to create jobs, to process natural resources, and to promote agriculture.

[29] 273 N.C. at 158, 159 S.E.2d at 760, *quoting* 1 COOLEY, THE LAW OF TAXATION § 176 (4th ed. C. Nichols 1924). *See also* 51 AM. JUR. *Taxation* § 324 (1944).

[30] Comment, *Eminent Domain—The Meaning of the Term "Public Use"—Its Effect on Excess Condemnation,* 18 MERCER L. REV. 274, 275 (1966). *See also* Note, *"Public Use" as a Limitation on the Exercise of Eminent Domain Power by Private Entities,* 50 IOWA L. REV. 799, 810-12 (1965).

[31] State Highway Comm'n v. Thornton, 271 N.C. 227, 243-45, 156 S.E.2d 248, 260-61 (1967).

[32] Comment, *The Public Use Doctrine: "Advance Requiem" Revisited,* 1969 LAW & SOC. ORDER 688, 694-95.

[33] Note, 25 N.C.L. REV., *supra* note 18, at 507.

police power.[34] This is seen in *Berman v. Parker*,[35] which has been viewed by some authorities as a "fundamental pronouncement [by the United States Supreme Court] of the merger of the police power and eminent domain into a single legal entity . . . ."[36] In *Berman* the plaintiff sought to enjoin the condemnation of his property under the District of Columbia Redevelopment Act. The Court noted a Congressional finding that the ends sought—the elimination of conditions injurious to the public health, safety, morals, and welfare—could not be obtained by ordinary private operations alone but also required public participation,[37] and it concluded that the power of eminent domain was simply a means to the end which was for "Congress alone to determine, once the public purpose has been established."[38] The Court further declined to restrict to public ownership the methods of attaining the public purpose of community development projects.[39]

The determination of public purpose by the court in *Martin* arose in the context of its earlier decisions regarding the exercise of eminent domain to improve housing and to redevelop cities. In *Wells v. Housing Authority*,[40] the court appears to have anticipated the *Berman* merger of the police and eminent domain powers in upholding the public purpose of the Housing Authorities Act to accomplish "slum clearance." This was based on the function of government to promote the health, safety, and morals of its citizens and the execution of this function by the elimination of conditions conducive to disease and disorder. In *Martin* the court looked also to *Redevelopment Commission v. Security National Bank*,[41] which upheld the condemnation of land pursuant to a redevelopment plan to eradicate "blighted areas." The definition of governmental function in the exercise of the merged eminent domain and police powers serves as

[34] The North Carolina Supreme Court has recognized the scope of the police power to embrace the protection of the public health, safety, morals, and general welfare. *E.g.*, S.S. Kresge Co. v. Tomlinson, 275 N.C. 1, 165 S.E.2d 236 (1969); Town of Wake Forest v. Medlin, 199 N.C. 83, 154 S.E. 29 (1930).

[35] 348 U.S. 26 (1954).

[36] Gormley, *Urban Redevelopment to Further Aesthetic Considerations: The Changing Constitutional Concepts of Police Power and Eminent Domain*, 41 N.D.L. REV. 316, 317 (1965).

[37] 348 U.S. at 29.

[38] *Id.* at 33.

[39] *Id.* at 35.

[40] 213 N.C. 744, 197 S.E. 693 (1938); *accord*, Cox v. City of Kinston, 217 N.C. 391, 8 S.E.2d 252 (1940). Mallard v. Housing Auth., 221 N.C. 334, 20 S.E.2d 281 (1942), reaffirmed the finding of a governmental function under the police power in the elimination of unsanitary dwellings.

[41] 252 N.C. 595, 114 S.E.2d 688 (1960).

a guide for the definition of governmental function for the exercise of the taxing power in *Martin* since "[w]hatever is necessary for the preservation of the public health and public safety is a public purpose for which taxes may be collected."[42]

Having recognized the interrelationship of the powers of police, eminent domain, and taxation, the court in *Martin* was still faced with the task of determining whether the activities of the Housing Corporation were pursuant to a proper governmental function for which the taxing power could be exercised. The two cases cited by the court had involved the physical elimination of poor housing. The public purpose in *Wells* was "slum clearance,"[43] while the public purpose in *Security National Bank* was the eradication of "blighted areas."[44] However, in *Martin* the object was to remedy the shortage of decent, low-cost housing by fostering the construction and financing of modest housing not otherwise available.[45] The court in *Mitchell* had not found a public purpose in the Authority's function of constructing and equipping facilities for private industry.[46] The dissent in *Martin*[47] considered the purpose of the Housing Corporation—assisting individuals in acquiring housing—distinguishable from the more direct elimination of a menace to the public health and safety in *Wells* and *Security National Bank* and indistinguishable from aiding individuals in housing businesses, which was not sustained by the court in *Mitchell*. The majority in *Martin*, however, distinguished *Mitchell* as involving the subsidizing of "particular private industries which were in competition with other unsubsidized industries."[48] Thus the presence of a governmental function in *Martin* appears to turn in part on the way the purpose of the activity is described[49] and the directness of its relation to the elimination of inadequate housing, which would be a proper exercise of the police power.[50]

However, there is an additional element by which these cases can be

[42] 51 AM. JUR. *Taxation* § 328 (1944).
[43] 213 N.C. at 747, 197 S.E.2d at 695.
[44] 252 N.C. at 604, 114 S.E.2d at 695.
[45] 277 N.C. at 48, 175 S.E.2d at 676.
[46] 273 N.C. at 159, 159 S.E.2d at 761.
[47] 277 N.C. at 60-63, 175 S.E.2d at 683-85.
[48] *Id.* at 50, 175 S.E.2d at 677.
[49] The majority view of eliminating the shortage of adequate housing is set against the dissenting view of aiding individuals.
[50] The majority view of attacking the shortage of adequate housing by fostering the planning, construction, and financing of low-cost housing is set against the dissenting view of inadequately relating the activities of the Housing Corporation to the elimination of slums.

reconciled. In each the court deals with the question of the proper role of government in relation to a private economy. How are the two to function in meeting particular problems? When is government intruding too far and threatening private capitalism? When is some degree of intrusion ever justified? It has been suggested that the term "public purpose" simply distinguishes those things for which the government is to provide from those to be left to private support. The determination of what is public or private frequently is a matter of policy and wisdom decided in light of the public welfare.[51] Concern for the relation of governmental and private activity is seen in *Mitchell*,[52] where the court cited *Nash* for the proposition that it is not the function of government to engage in private business. The court also noted the observation in *Wells* that the existence of slums shows the impotency or unwillingness of private enterprise to deal with the problem, thus impelling government to act where community initiative has failed. The opinion likewise addresses the concern with private activity by explicit reference to the legislative finding of the inability of unassisted private enterprise to meet the need for low-cost, safe, and sanitary housing.[53] Thus the finding of a governmental function in *Martin* appears to be based in part on the noninterference with the private sector by the activities of the Housing Corporation.

The concern of the dissent for the benefit accruing to the individual homeowners resolves itself in large measure in how the activities of the Housing Corporation are described. If taken to be for the purpose of eliminating the shortage of adequate housing and thus promoting the public health, safety, morals, and welfare, the activity should be sustained. The court has held in *State Education Assistance Authority v. Bank of Statesville*[54] that "the fact that the individual obtains a private benefit cannot be considered sufficient ground to defeat the execution of 'a paramount public purpose.'" The activities of the Housing Corporation would certainly inure to the benefit of individuals, while achieving the public purpose of fostering the construction of adequate housing. Individuals also

[51] 51 AM. JUR. *Taxation* § 326 (1944). *See also* Note, *"Public Use" as a Limitation on the Exercise of the Eminent Domain Power by Private Entities*, 50 IOWA L. REV. 799, 815 (1965); Note, *Industrial Revenue Bonds*, 4 WILLIAMETTE L.J. 517, 521 (1967).

[52] 273 N.C. at 156-58, 159 S.E.2d at 758-59.

[53] 277 N.C. at 49, 175 S.E.2d at 676. The court also quotes from the Act passages indicating that many of the loans to be made by the Housing Corporation were to be made only upon the determination that they were not otherwise available from private lenders on reasonably equivalent terms.

[54] 276 N.C. 576, 588, 174 S.E.2d 551, 560 (1970).

benefit when a housing authority eliminates a slum, but this activity has been considered a public purpose in North Carolina since *Wells* was decided in 1938.

The dissent's concern with the indirectness of the efforts of the Housing Corporation in eliminating inadequate housing is likewise answered in part by the existing case law. The court has upheld the discretion of housing authorities in locating their projects on sites not presently in a slum area.[55] Thus the court has not insisted in every instance on the most direct attack on the slum to sustain a finding of public purpose. This view is consistent with the development of the law following *Berman* whereby "[h]ousing projects for persons of low income alone, without provisions for slum clearance, became objects for which the power of eminent domain could be exercised."[56] In *Martin* the court found sufficient nexus between the activities of the Housing Corporation and the elimination of the shortage of low cost housing, and such minimal intrusion into the private arena that the activities could be sustained as pursuant to a proper governmental function and thus for a public purpose. In so holding the court acted in the context of existing case law without overruling *Mitchell*, which can be seen as blocking deep-seated involvement in the affairs of private enterprise. Nevertheless, the analytical tools of *Martin* afford the means to modify the *Mitchell* result should the purpose sought be of sufficient social importance, the means chosen sufficiently direct, and the degree of intrusion into the private sphere sufficiently circumscribed.

KENNETH C. DAY

Personal Jurisdiction—Jurisdiction Over Foreign Corporation Based Upon Making a Contract in North Carolina

Courts can obtain personal jurisdiction over nonregistered foreign corporations by the use of long-arm statutes.[1] *International Shoe Co. v.*

[55] *E.g.*, Housing Auth. v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962); *In re* Housing Authority, 233 N.C. 649, 65 S.E.2d 761 (1951).

[56] Comment, 1969 LAW & SOC. ORDER, *supra* note 32, at 697.

[1] For a brief review of the development of the long-arm statute, see McGee v. International Life Ins. Co., 355 U.S. 220 (1957). The important thing to remember about long-arm statutes is that the mere ability to fit a situation within a statute's language does not mean that jurisdiction will always be proper. The ultimate test is the due process clause of the fourteenth amendment—not the wording of the long-arm statute. *Id.* at 222.