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An Anomaly in American Jurisprudence

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AN ANOMALY IN AMERICAN JURISPRUDENCE

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SINCE the beginning of the present century there has been developed a body of "legal principles which settle the conflicting claims of executive or administrative authority on the one side, and of individual or private right on the other."[1] This body of legal principles has been called "the conspicuous feature of our American Law" by Dean Pound of Harvard, who also states that the practical application of these principles "appears to have very much in it of a reversion to a primitive justice without law." Freund has also designated this modern feature of our jurisprudence as the exercise of "unstandardized power" (practically unrestrained power); in other words, both of these authorities strongly suggest the thought that administrative law provides a short cut to the securing of individualized justice.

The observer of modern jurisprudence readily notes the great multiplication of administrative tribunals in almost every state of the Union as well as in the nation. It almost appears as though some new administrative tribunal is created somewhere every day and existing administrative tribunals are given new powers every week. Considering the rapid development of this new branch of governmental activity, the anomaly of the situation consists in the fact that neither the federal nor our Wisconsin Constitution, contain a provision which even by direct inference justifies the creation of these administrative boards and the performance of functions that have been committed to them by the legislature. The American Government, both federal and state, is primarily a constitutional government, the important functions of which are grounded upon positive provisions of the fundamental law of the land. The constitutions provide that the executive, legislative and judiciary be co-equal, thus creating what has been called a government of checks and balances. Yet, an examination of our political and legislative history shows that these three departments have never been actually co-equal, but either one or the other of them was a little ahead

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[1] Freund on *Administrative Law,* page 1.

ED.—The author is considering the development of the idea that the field now covered by Administrative Law by the three recognized departments of the government, might more properly and effectively be centralized into a new and separate department. An article of this nature by the author will appear in the REVIEW in a subsequent issue.

of the rest. In the beginning of our constitutional history, the legislative branch was considered as the most important branch of the government because it pre-eminently represented the people and the judiciary and executive were held immediately answerable to the legislature and only remotely to the people. After the adoption of the Fourteenth Amendment the superiority of the legislature was replaced by the superiority of the judiciary and for a time it was held that no executive act amounted to much unless its validity had been inquired into judicially. Almost every legislative act was subject to the challenge of constitutionality in the courts and during this period we find that the most important work of the government was done by the judiciary, but since the beginning of this century the importance of the legislative and of the judiciary seems to have disappeared and we now find that the great bulk of governmental activity in the states and in the nation is performed by what, for want of a better term, has been called the administrative branch of government, although this is a misnomer and in no way describes the real character of the functions performed by this department.

It is well recognized by all familiar at all with this new branch of our jurisprudence that these administrative bodies perform legislative, judicial and administrative functions and in the performance of these functions come in contact with practically every citizen of the country. Many persons have gone through life without getting into a court of justice, but it is practically impossible now to avoid contact with some administrative authority no matter in what walk of life we may travel. None of us can avoid coming in contact, or even conflict, with the traffic officers on the street corners.

How extensively administrative activity has entered into the social, economic, industrial and political life of the nation appears when you glance at the multifarious agencies the federal and state governments have created to regulate and control the conduct of the individual for the purpose of promoting the well-being of the community. Thus the federal government has created and maintains an interstate commerce commission, a federal trade commission, a railroad labor board and other similar bodies, exercising vast powers and carrying grave responsibilities. In the states we have examining boards and other bodies to pass on the competency, responsibility, or other qualifications of private schools, chauffeurs, engineers, surveyors, private detectives, real estate brokers, stockbrokers, teachers, chiropodists, nurses, public accountants, shorthand reporters, physicians and surgeons, midwives, peddlers, lawyers, dentists, pharmacists, plumbers, undertakers, embalmers, veterinarians, optometrists, architects, employees of the state

and its civil divisions, and other professions, trades and callings; also boards and commissioners of education, public service commissions, probation commissions, parol boards, athletic commissions to regulate boxing and wrestling contests, racing commissions, bank examiners, insurance departments, transit commissions, health boards with divisions for the safeguarding of motherhood, saving of infant life, and instruction in child hygiene, child welfare boards, tax commissions, tenement house commissions, building commissions, water power commissions, water control commissions, commissions for the blind and for mental defectives, recreation commissions, boards of charities, agricultural commissions with power to grant indemnities for diseased animals destroyed and for animals killed by dogs, conservation commissions, boards of child welfare for the granting of mothers' allowances, and motion picture commissions.

The anomalous feature of this immense field of governmental activity consists in the fact that all of the foregoing enumerated functions of government have been instituted and are being maintained without any direct authority therefor in either the federal or state constitutions as already suggested. The federal Constitution does not even provide for administrative officers, but makes provision only for a President and Vice President to constitute the executive department. It has been suggested by our own Supreme Court[2] that, since the Constitution of the United States gives Congress power to make all laws necessary and proper for carrying into execution the powers of that instrument vested in the government of the United States or in any department or officer thereof[3] this is the source of the authority for Congress to enact administrative legislation. The Constitution of Wisconsin does contain an article providing for administrative officers[4] but even those provisions have reference to mere ministerial duties, such as keeping the records of the state, auditing accounts and the like, and make no suggestion whatever that officers created under this article are to have supervisory control over the individual affairs of the citizen.

It has been suggested that the creation of what is known as the administrative function of the government is but the exercise of the police power of the nation because such exercise is not only for the purpose of prohibiting and punishing, but also for regulating and supervising the conduct of the citizen. This suggestion adds only another anomaly to the exercise of administrative jurisprudence, at least as far as the

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[2] *Minn. St. P. & S. Ste. M. Ry. Co. v. R. R. Comm. of Wis.*, 136 Wis. 146-160, 116 N.W. 905.

[3] U. S. Const. Art. I, Sec. 8, Sub. 18.

[4] Wis. Const. Art. VI.

federal government is concerned. It has been uniformly held in the federal and the state courts that the federal government possesses no police power but that the exercise of such power was reserved to the states under the Constitution—"a power which the state did not surrender when becoming a member of the Union under the Constitution."[5]

In passing, let it be suggested that the scope of the police power is most elastic. No court has ever dared to define it. No administrative board or tribunal seems to hesitate to exercise it.

Shall we be alarmed because of this unstandardized growing power of administrative justice in our body politic? It cannot be denied that there are certain dangers involved in telling people what to do and what not to do by special directions for a particular case rather than by general rules. Telling people in advance what they may do and what they may not do in any given case is an experiment and all experiments involve certain dangers. Our administrative commissions and tribunals are like our traffic officers who give us signals to tell us when to cross and when not to cross and where to cross and jaywalking is prohibited. Nevertheless, the increased importance of administrative justice is nothing more than the natural result of the evolution we have been passing through, economically, socially and industrially. This administrative movement in the law is simply a part of that general movement to deal with the individual as a concrete human being and not as an abstract individual. We are beginning to appreciate the importance of the human equation not only in our social affairs but also in economic, industrial and political relations. Points of contact between the individuals of a community are much more numerous than they were in the days of our fathers. The greatest danger in the continually expanding power of the exercise of administrative justice lies in the predominant tendency to regulate and control by legislation these points of contact between the individuals in the complex organization of society as it exists today.

It is not our purpose herein to discuss the dangers of this new system of administering justice determining the rights between man and man and between man and his government, or to suggest a remedy or remedies for evils already existing, or that threaten for the future. The American people seem to be determined to stake their faith on legislation as a cure for economic, social and industrial evils and appear to be satisfied to grant plenary administrative power to tribunals and commissions to supplement legislative and judicial action and to leave the result to the future.

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[5] *Jacobson v. Mass.*, 197 U. S. 11.

WHAT IS NEGOTIABILITY?

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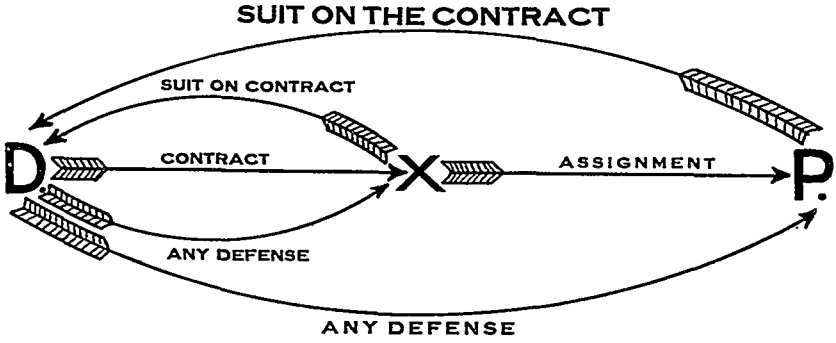
THE word "negotiable" is a magic word. Whether or not an instrument is negotiable or is merely assignable raises the full force of the magic that is performed if the instrument is in fact negotiable in form and is negotiated to a holder in due course. Some of the simple illustrations will provoke thoughts which will clearly portray this difference.

If an ordinary contract is made between D and X, and assigned by X to P, P may sue D upon the contract but P is subject to all of the defenses which D had against X. A simple illustration is as follows:



However, if the instrument was negotiable in form, having all of the five requirements in Section 116.02 (being the Wisconsin section number of the Uniform Negotiable Act on the necessary form of the instrument), and if all of the five requirements of the holder in due course statute (being Section 116.57 of the Wisconsin Statutes), apply to the case, then the uniform negotiable instrument law (or the old law merchant prior thereto,) erects a wall, so to speak, between the holder and the maker so that the holder may sue the maker from the point of advantage and the wall prevents the maker's defenses from getting at the holder. If any of the requirements of the two statutes just mentioned are absent or defective, there is immediately a hole in the wall through which the defenses may be hurled at the holder. As the law has been changed in Wisconsin, there is one defense which seems to be always

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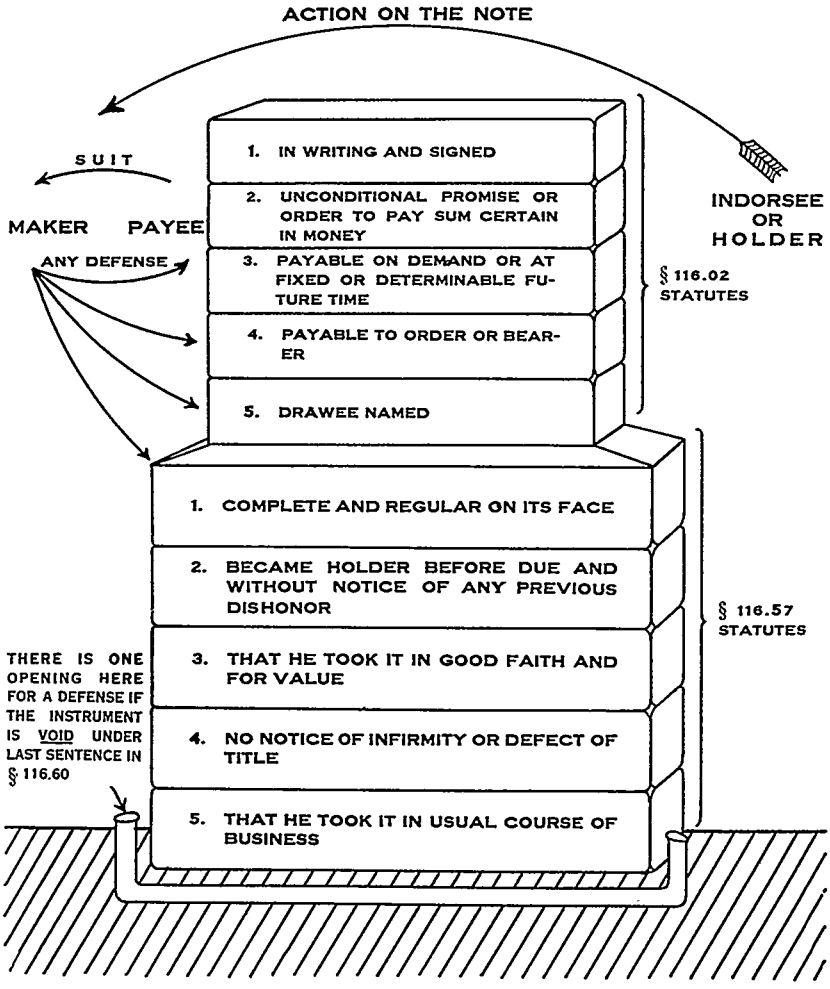
ACTION ON THE NOTE
SUIT
MAKER
PAYEE
ANY DEFENSE
INDORSEE OR HOLDER
1. IN WRITING AND SIGNED
2. UNCONDITIONAL PROMISE OR ORDER TO PAY SUM CERTAIN IN MONEY
3. PAYABLE ON DEMAND OR AT FIXED OR DETERMINABLE FUTURE TIME
4. PAYABLE TO ORDER OR BEARER
5. DRAWEE NAMED
§ 116.02 STATUTES
1. COMPLETE AND REGULAR ON ITS FACE
2. BECAME HOLDER BEFORE DUE AND WITHOUT NOTICE OF ANY PREVIOUS DISHONOR
3. THAT HE TOOK IT IN GOOD FAITH AND FOR VALUE
4. NO NOTICE OF INFIRMITY OR DEFECT OF TITLE
5. THAT HE TOOK IT IN USUAL COURSE OF BUSINESS
§ 116.57 STATUTES
THERE IS ONE OPENING HERE FOR A DEFENSE IF THE INSTRUMENT IS VOID UNDER LAST SENTENCE IN § 116.60

open to the maker and that is in the last sentence of Section 116.60, which provides that

"title of the holder is absolutely *void* when such instrument or signature was so procured from the person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care."

This defense is practically limited to the state of Wisconsin. If the endorsee or holder is behind the perfect wall erected by the two statutes mentioned above, then Section 116.62 of the Statutes provides as follows:

"a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon except (immaterial provisions as to the insurance premiums) and except also in cases where the title of the person negotiating such instrument *is void under the provisions of Section 116.60 of this act.*"

(Now assuming that an action may go up and over and that a defense must either go straight through or down we might illustrate the proposition as follows:

It is to be noted that Section 116.62 above quoted, says that the holder may enforce payment against "all persons liable thereon." Now, there are two additional possible defenses which are not mentioned in that statute in connection with the "void" defense pictured above. Section 116.27 reads as follows:

"where a signature is forged or made without the authority of the person whose signature it purports to be, *it is wholly inoperative,* and no right to retain the instrument, or to give a discharge thereof, *or to enforce payment thereof* against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority."

Section 117.42 of the statutes reads as follows:

"where a negotiable instrument is materially altered without the assent of all parties liable thereon, *it is avoided,* except as against a party who has himself made, authorized or assented, orally or in writing, to the alteration and subsequent endorsers."

These two statutes last quoted are clearly inconsistent with the provisions of Section 116.62 quoted above which says that the holder in due course holds the instrument free from all defenses excepting the "void" defense under Section 116.60. This inconsistency in the statutes, however, was not the purpose of this article. The purpose of this article

was to suggest to the law student some method of comprehending the real effect of the word "negotiable" and the importance of the various requirements to bring about the magic word of negotiability so that the holder may be a holder in due course.

Now, suppose the instrument was not payable to order or bearer, there immediately is a hole through the fourth stone in the top part of the wall, and any defense which was good between the original parties may be hurled right through and will be good against the holder, which of course prevents the holder from being a holder in due course and prevents the magic word of negotiability from operating. The same is true of any other of the five requirements of the law on "form." Likewise, suppose that the holder secured the instrument after it was due on its face; then there is immediately a hole through the second stone in the base of the wall, through which any defense may be hurled. A similar situation arises if any of the five requirements of the law on "holder in due course" are defective. In Wisconsin, likewise, if an instrument is void because it was secured from a person who did not know the nature of the instrument and could not have obtained such knowledge by the use of ordinary care (Sec. 116.60), then there is a by-pass under the wall through which the defenses may be hurled. In most states the wall stands between a holder in due course and the maker without the by-pass just mentioned.