

## Administrative Law: Delegation of Powers; Constitutional Law

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## NOTES AND COMMENT

### Administrative Law—Delegation of Powers—Constitution Law.

The founders of our great constitutional system, upon which are based both the federal and state theories of government, were, no doubt, little aware of the tremendous development to follow in the field of administrative law.

The discussion of the growth of delegation of legislative power to administrative bodies, is most aptly set forth in a recent decision of the Wisconsin Supreme Court, in the case of *State v. Whitman* (July 17, 1928, 220 N.W. 59). This action was by the State of Wisconsin against Whitman, Commissioner of Insurance of the State of Wisconsin, and involved the construction and constitutionality of the Rating Laws in Wisconsin (Chap. 203 Wis. Statutes), and the question of the power of the Commissioner of Insurance under such Act. Justice Rosenberry, writing the opinion therein, deals exhaustively and elaborately with the subject of administrative law, citing its origin and development and stressing the importance of its consideration in present national government. Quoting him :

Beginning with the creation of the Interstate Commerce Commission, which in the beginning was little more than an extra legislative committee, there has been a development in our law brought about chiefly by the creation boards, bureaus and commissions, which has worked and is working a fundamental change. Not only are legislative and judicial powers delegated, but they are exercised in combination, and we not infrequently find powers belonging to the three co-ordinate branches of government combined in a single administrative agency. The change is fundamental, because the law at least in some of its aspects, no longer emanates from the legislature, is no longer wholly declared and enforced by the courts, and, to the extent that this is true, we have departed from the fundamental principles upon which our political institutions rest. This has been the cause of much concern, and is a source of much diversity of opinion.

The doctrine of separation of powers of the three recognized branches of government, executive, judicial and legislative, has presented an almost insurmountable obstacle to the development of administrative law in this country. President Coolidge said recently, "Through regulations and commissions we have given the most arbitrary authority over our actions and our property into the hands of a few men." On the other hand we have the statements of Elihu Root, Freund, and others, to the effect that the increasing burden upon the government,

due to the development of complex conditions, had given rise and impetus to the necessity of delegation of power to subordinate agencies, under the control and direction of the superior authority. Practically all agree, however, that the system of administrative law is but in its infancy, and fraught with the natural dangers of delegation of power to a few individuals. As Elihu Root expresses it, "A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect."

Courts have recognized the situation, and, under one pretext or another, have upheld laws in recent years that undeniably would have been held unconstitutional, under conditions which existed prior to the Civil War. Perhaps the latest authoritative declaration upon this subject is found in *Hampton v. United States* (48 S. Ct. 348, 72 L. Ed.). Therein, in thoroughly reviewing the subject, the United States Supreme Court points out that it would be impossible, in the practical administration of the law, to have a complete, absolute, scientific separation of the so-called co-ordinate governmental powers. This case held that the law vesting in the President the power to fix import duties was not an unconstitutional delegation of legislative power. In referring to the three branches of government, and the power of each individual branch to invoke the co-ordination of the others, the Court says, "In determining what it may do in seeking assistance from another branch, *the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.*"

An outstanding example of true administrative agency in Wisconsin may be found in the operation of the Railroad Commission, which has for its function, among other things, the power to regulate rates for public utilities. This power is sustained on the theory that it is a fact-finding operation, that there is one just and reasonable rate, and that it is the duty of the administrative agency to discover that as a matter of fact. It is apparent that such a body is endowed with certain discretion, and will not be disturbed in the exercise of such discretion unless there is an abuse thereof. If such an administrative body was not allowed the power to exercise reasonable discretion, its activity would be as inflexible and circumscribed as an act of the Legislature. Again quoting Justice Rosenberry in *State v. Whitman* supra, "They *can* be and *are in fact* endowed with discretionary powers, but the field in which those powers are to be exercised is prescribed."

The modern consensus of the courts, nationally, is that there is an overpowering necessity for a modification of the doctrine of strict separation and non-delegation of powers of government. In conformity with this necessity, the natural tendency of our courts has been towards

the further development of administrative agency, in a slow, orderly way, rather than to attempt to achieve this singularly desirable end, in a single bound by constitutional amendment.

Necessarily, administrative bodies or officers must act, not only within the field of their prescribed statutory powers, but in a reasonable and orderly manner. No administrative agency can properly assume arbitrary and uncontrolled power. Numerous cases of authoritative nature support the above doctrine, the foremost of which are: *Standard Oil Co. v. U.S.* 221 U.S. 1; 31 S. Ct. 502; 55 L. Ed. 619, *U.S. v. American Tobacco Co.*, 221 U.S. 106; 31 S. Ct. 632; 55 L. Ed. 663, *Kansas City So. Ry. v. U.S.* 231 U.S. 423; 34 S. Ct. 125; 58 L. Ed. 296. To cite again the learned words of Justice Rosenberry in *State v. Whitman* supra, "The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness." To exemplify this, it is apparent that no mere administrative officer could properly decide a question of constitutionality, as held in *Pollitz v. Michigan Rd. Comm.* (205 Mich. 549; 172 N.W. 611).

As early as 1863, the Wisconsin Supreme Court had before it questions dealing with the delegation of power to administrative bodies. A tendency bordering on reluctance to develop this theory was prevalent, but slowly a trend appeared in favor of a more constructive attitude on this subject, until today, the Wisconsin statutory system confers many broad and generous powers on its administrative bodies, notably that of the Industrial Commission. There are many Wisconsin authorities to illustrate the almost cautious development of this addition to our state governmental system.

*Adams v. Beloit* (105 Wis. 363; 81 N.W. 869), *State ex rel. Boycott v. La Crosse* (107 Wis. 654; 84 N.W. 242), *State ex rel. Van Alstine v. Frear* (142 Wis. 320; 125 N.W. 961), *State ex rel. Nehrbass v. Harper* (162 Wis. 589; 156 N.W. 941), *Klein v. Barry* (182 Wis. 255; 196 N.W. 457).

In consequence, something akin to a parallel can be drawn between the gradual, steady and constructive evolution of the principle of administrative legislation and the feature of constitutional law which it embodies, and other similar movements in history which owe their inception and development to the urge of necessity and the capabilities of men.

CHESTER F. KRIZEK

#### Automobiles—Contributory negligence as a matter of law—Look and listen rule applied to pedestrians.

On May 8, 1928, the Wisconsin Supreme Court gave decisions in three cases which can be considered a trilogy of cases on contributory negligence in automobile accident cases.