Volume 61 | Issue 1 Article 6

December 1958

Constitutional Law--Delegation of Legislative Power--Time Fixing Statute

L. S. D.
West Virginia University College of Law

CASE COMMENTS

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—TIME FIXING STATUTE.—*D* was charged with violation of Ky. Acts. 1958, ch. 15, § 1, which provided that the standard of time as fixed by an Act of Congress or by an order of the Interstate Commerce Commission should apply to and govern all laws, regulations, and rules of the commonwealth, its governmental subdivisions and its agencies. Both parties appealed the lower court's decision to the supreme court of the commonwealth. *Held,* that the act is unconstitutional in so far as it adopts time standards to be fixed in the future by Congress or the Interstate Commerce Commission. *Dawson v. Hamilton,* 314 S.W.2d 532 (Ky. 1958).

The doctrine of separation of powers and the corresponding prohibition against the delegation of duties are inherent in our American constitutional system. *Butler v. Printing Comm'rs,* 68 W. Va. 493, 70 S.E. 119 (1911); *Norwalk Street Ry. Appeal,* 69 Conn. 576, 37 Atl. 1080 (1897). It is the duty of the legislature to enact laws, and while this power cannot be delegated, the legislature can delegate any function which it may validly exercise that is not legislative in nature. *Livesay v. DeArmond,* 131 Ore. 563, 284 Pac. 166 (1930). In addition, where the legislature has enacted a statute which is complete and which states the general policy to be followed, the legislature may delegate to another body the duty to carry out the administrative, nondiscretionary matters contained within the statute. *Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec., Light & Power Co.,* 191 N. Y. 123, 83 N.E. 693 (1908).

While almost all jurisdictions recognize that the assignment of these above mentioned duties is not prohibited by their constitutions, see *Norwalk Street Ry. Appeal, supra,* there is not so much agreement in some of the following situations.

Where the legislature enacts a statute which is already in existence in another jurisdiction, the courts, of course, agree that there is no contravention of the constitution. *Philips v. Tennessee,* 304 S.W.2d 614 (Tenn. 1957); *Ex parte Burke,* 190 Cal. 316, 212 Pac. 193 (1923); *Ex parte Kinny,* 53 Cal. App. 792, 200 Pac. 966 (1921).

Where the legislation is contingent upon the enactment of a statute by another state, the cases are evenly split, with the weight of authority holding that the legislation is unconstitutional. *Pitts-*

burgh v. Robb, 143 Kan. 1, 53 P.2d 203 (1936); *State v. Brothers,* 144 Minn. 337, 175 N.W. 685 (1919); *People v. Fire Ass'n of Philadelphia,* 92 N.Y. 311 (1883). *Contra, Beeland Wholesale Co. v. Kaufman,* 234 Ala. 249, 174 So. 516 (1937); *State v. Fireman Fund Ins. Co.,* 223 Ala. 134, 134 So. 858 (1931).

Where the legislature adopts prospective legislation of another legislative body, the great weight of authority holds that this is attempting to allow a body other than the legislature to enact the laws of the state; and therefore, it is an invalid delegation of the legislative prerogrative. *State v. Urquhart,* 50 Wash. 2d 131, 310 P. 2d 261 (1957); *Crowley v. Thornbrough,* 226 Ark. 768, 294 S.W.2d 62 (1956); *Cleveland v. Piskura,* 145 Ohio St. 144, 60 N.E.2d 919 (1945). *Contra, People ex rel. Pratt v. Goldfogle,* 242 N.Y. 277, 151 N.E. 452 (1926).

Some authorities in the legislative field assert that the adoption of prospective legislation should be upheld because "the enactment has not amounted to a *permanent* loss of sovereignty or legislative power .... [for] ... the local legislature retains its power to change the statute if it is not satisfactory." 1 SUTHERLAND, STATUTORY CONSTRUCTION, § 310, at 69 (3d ed. 1943). (Emphasis added.)

It is submitted that the court in the instant case was correct in holding the statute unconstitutional in so far as it adopted the prospective legislation. It is difficult to view the adoption of prospective legislation of another jurisdiction as anything other than a delegation of power. It is felt that any argument which asserts that such delegation should be accepted because it is only temporary and may be repealed is untenable. The legislature's duty is to enact the laws of the state, not to stand as a watchdog over the enactments of another legislature, passively accepting that of which it approves and being forced as a defensive measure to repeal that of which it may from time to time disapprove. It is believed that there is no provision in the constitution which would allow even a temporary or part time delegation. The court must have had this proposition in mind when it said that there is a *continuing* duty on the part of the Kentucky legislature to determine what is in the best interest of the commonwealth. *Dawson v. Hamilton, supra* at 536.

The admonition once expressed by Mr. Chief Justice Holmes is not inappropriate here. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough

to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922).

L. S. D.

CONSTITUTIONAL LAW—DUE PROCESS—PRE-NEED BURIAL CONTRACT STATUTE HELD UNCONSTITUTIONAL.—*D,* a corporation selling burial merchandise under pre-need contracts, refused to comply with a West Virginia statute, W. VA. CODE ch. 47, art. 14, § 1 (Michie 1955), which declared all such contracts to be against public policy and void unless the money paid thereunder be placed in and held by a federally insured banking institution authorized to do business in this state. The state sought an injunction to restrain *D* from violations of the deposit provisions of the statute. *D*'s answer and cross-bill asserted that the statute was unconstitutional and that compliance with the deposit provisions thereof would compel it to cease doing business. *Held,* that the statute was an unwarranted exercise of state police power and was unconstitutional, being violative of the due process clauses of both state and federal constitutions. *State v. Memorial Gardens Dev. Corp.,* 101 S.E.2d 425 (W. Va. 1957).

The court in the principal case indicated no regulation of this business is necessary. Several other jurisdictions have enacted similar legislation. See, *e.g.,* KAN. GEN. STAT. ch. 16, art. 3, § 1 (1957 Supp.); WYO. STAT. ANN. ch. 52, art. 1, § 9 (1957 Supp.); OHIO REV. CODE § 1317.12 (Baldwin 1953). This legislation prompts study of the court's reasoning in the principal case.

In declaring the legislation invalid, the court stated that the police power of a state is too narrow and too limited to permit regulation of such a business. While no fixed rule can be stated as to when a business will come within the police power of a state, it is settled law that this power is broad and sweeping, and it may be drawn upon by the legislature for the public good. *State ex rel. Morris v. West Virginia Racing Comm'n,* 133 W. Va. 179, 55 S.E.2d 263 (1949); *Hinebaugh v. James,* 119 W. Va. 162, 192 S.E. 177 (1937). It is not only the right, but the duty of the legislature to employ the police power where necessary for the protection of the safety, health, morals, and welfare of the people. *Nebbia v. New York,* 291 U.S. 502 (1934).