November 1920

Judicial Control of Administrative Judgment as to Validity of Bonds

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A recent West Virginia decision has recognized, apparently, the soundness of this view. The addressee in that case sued in tort for failure to deliver a telegram to him. The company argued that its liability should be limited by certain stipulations agreed to by the sender of the telegram. The court said, "Although this is an action of tort brought by the addressee, and not a suit on the contract, nevertheless, these conditions, being reasonable regulations are binding on the addressee as well as the sender . . . . such provisions, when reasonable, are determinative of the company's duty to the public, regardless of any contractual relation."——G. E. O.

JUDICIAL CONTROL OF ADMINISTRATIVE JUDGMENT AS TO VALIDITY OF BONDS.—In 1917, the West Virginia Legislature passed an act providing that before any "county . . . or other municipality" might issue bonds, payable by taxation, the validity of the proposed indebtedness should first be approved by the Attorney General. This officer was to have before him, the bonds, and "a duly certified copy of all the orders, proclamations, notices, advertisements, affidavits and records and of all . . . proceedings connected with . . . said bond issue." This data was to be sent to him by the municipality within two weeks after the popular vote authorizing the bond issue. The Attorney General's approval was to render the validity of the bonds forever incontestible in any court, unless, within ten days, some taxpayer or other person in interest filed a petition in the Supreme Court of Appeals, asking that the action of the Attorney General be "reversed or modified." The matter thus submitted was to be proceeded with by the Court as in cases of original jurisdiction. All data before the Attorney General, as well as a statement by that officer of the reasons underlying his decision, were to be presented to the Court, which was then "to decide the matter in controversy and enter such order thereon as to it may seem to be just."

The recent West Virginia case of State ex. rel. Allen v. England, raises the interesting question as to whether the type of judicial control of the Attorney General's action contemplated by this

25 Dunham v. Western Union Tel. Co., supra.
26 Ibid., 116.
1 Acts of W. Va. 1917, c. 57.
2 Ibid., § 1.
3 Ibid., § 2.
4 103 S. E. 400 (W. Va. 1920). Mr. Justice Miller delivered the opinion of the Court. Mr. Justice Ritz dissented from the reasoning.
statute does not violate the constitutional provisions relating to the separation of powers. The solution of this problem involves a consideration of the two further questions: (1) Is the task of the Attorney General an administrative or a judicial function? (2) Does the action of the Attorney General constitute a taking of property without due process of law, in violation of the Fourteenth Amendment?

In passing upon the validity of the proposed bond issue, the Attorney General must "ascertain whether statutory authority exists for the issuance of the bonds, whether the essential facts exist upon which the exercise of such authority may be conditioned, and whether the forms and methods prescribed by the constitution and statutes have been complied with." It may, perhaps, he said that these are duties peculiarly judicial in character, in that they consist of the application of statutory rules of law to ascertained situations of fact and the determination of the resulting legal consequences. The usual external setting and machinery of judicial action are, however, wholly lacking. There are no contending parties to the proceeding. No case or controversy is presented for settlement. No hearing is provided for. No evidence is taken, nor arguments heard. The Attorney General examines the various data, the statutes and the constitution, and comes to a conclusion in what is presumably an ex parte office proceeding. The task before him is not that of immediately enforcing or adjudicating personal or property rights, for none are asserted. Rather, his function is that of taking the last step in the preliminary procedure prescribed by law for the creation of a bonded indebtedness by a municipality. He renders a finding and a certification that all essential conditions have been fulfilled and that the indebtedness, if later actually incurred by the sale of the bonds, will have been validly established. The Attorney General is thus called upon "to exercise judgment and discretion, to investigate, deliberate and decide," and thereby to exercise powers very similar to those of the judiciary. The point is, however, that the exercise of these powers is merely incidental to the part the Attorney General plays in the process by which a municipal corporation borrows money. Accord-

5 CONSTITUTION OF WEST VIRGINIA, 1872, Art. V.
6 State ex rel. Board of Education v. West, 29 Okla. 503, 118 Pac. 146, 148 (1911). The Oklahoma statute, in this particular, was the same as that in West Virginia.
ingly, it is believed that the action of the Attorney General is an administrative and not a judicial function.\textsuperscript{a}

Whether the action of the Attorney General, as contemplated by the statute, constitutes a taking of property without due process of law, was not considered by the Court in the principal case. It is, however, an important factor in the solution of the main question under discussion, for, if due process is not thus afforded, an independent judicial determination of the merits of the case is probably available, under the Fourteenth Amendment, as a matter of right.\textsuperscript{b}

In this connection, the first question to be considered, is whether the Attorney General’s decision actually deprives any one of property. Taking the least likely phase of the matter first, it may be said that it does not, for the following reasons: The decision is not an enforcement or adjudication of any right. It does not compel or require action by any one. Neither the municipality, the public, nor any individual, at the moment of the decision, has been divested of anything, for the municipality has not yet offered the bonds for sale. Conceivably, it may decide, even after a favorable ruling on their validity, to abandon the project. Thus the Attorney General does not incur the debt on behalf of the municipality, to pay which taxes may be levied upon the property of the inhabitants. This is done by the municipal officers. It is, therefore, not until taxes are collected that anyone’s property is taken. The most the Attorney General does is to announce to the bond market that all conditions required by law for the creation of a bonded indebtedness by a municipality have been complied with, and that, if the municipality now goes ahead and actually incurs the proposed obligation by the sale of the bonds, the validity of that obligation will be, by virtue of his decision, forever incontestable in any court. This is true whether the Attorney General is correct or incorrect in his judgment. According to this view, the taking of an individual’s property through taxation in order to pay off the interest and principal on a bonded debt is too remote to be said to have been caused directly by the Attorney General’s


decision that the municipality had the power to negotiate the bonds, if it saw fit.

It is believed, however, that the Attorney General’s approval of the validity of the bond issue does deprive individuals of property. It constitutes one part of a process that has been provided by law for the incurring by the municipality of a valid bonded debt. His decision is a part of the issuing machinery. Although, conceivably, the municipality still has the privilege of abandoning the project, such a result, by the time the matter reaches the Attorney General, is rather remote. This taking of property by taxation is a direct result, and, under the West Virginia Constitution, a necessary result, of the incurring of the debt, in which the Attorney General’s decision is an important step. Moreover, it is his decision that later operates to prevent the taxpayers from alleging the debt’s invalidity and on that basis contesting the collection of the tax.

Assuming, then, that there is a taking of property, does the action of the Attorney General constitute a taking by due process of law?

In determining whether due process of law is afforded in a given type of administrative proceeding, it may be inquired whether such a method was the usual and customary plan resorted to for accomplishing the particular object in view, at the time of the adoption of the due process clause of the Constitution. If it was, it cannot be said that the broad language of this clause was intended to prevent the subsequent use of that method. In newer forms of proceedings, however, another test must be resorted to. "It is familiar that what is due process of law depends upon circumstances. It varies with the subject matter and the necessities of the situation." The means taken by the administrative agency to attain its end must be such as are on the plain face of it, adequate to the securing of justice. The individual must have a guaranty that the action of the government will not be arbitrary or capricious. So, where the nature of the action required of an administrative official is such that his task is merely that of comparing the facts in hand with a settled standard, and of deciding

10 Art. X, § 8. "No county, city, school district or other municipal corporation . . . shall hereafter be allowed to become indebted . . . without, at the same time, providing for the collection of a direct annual tax, sufficient to pay annually, the interest on such debt, and the principal thereof, within . . . thirty four years."
13 31 HARV. L. RSV. 644.
that they do or do not comply therewith, due process of law is afforded if he has a reasonable basis for the exercise of his judgment, and if he acts within the powers granted to him. The issuing of a notice and the granting of a hearing to the parties affected could not, in such a case, be of material value in assisting the official to come to a conclusion. They are not, therefore, essential.\(^{14}\)

It is believed that the action of the Attorney General, in certifying, in an *ex parte* proceeding, that, in his opinion, all essential conditions prescribed by law have been complied with, and that the proposed municipal bond issue may validly be carried out, belongs to this class of cases, and that it affords due process of law. It has been suggested that if his action constitutes a taking it is because his decision is a part of a process that necessarily and directly results in taxation. It must be kept in mind, however, that even so, the Attorney General takes no immediate part in the levy or assessment phases of taxation. These phases are carried on by the municipal officers. Due process, for this reason, as to the Attorney General’s decision, cannot be determined by a consideration of what constitutes due process in the levy and assessment proceedings carried on in connection with taxation.

Due process being afforded in the administrative proceeding, an independent judicial determination of the merits of the case is probably not available as a matter of right. It is, however, necessary that there be available a more limited type of judicial proceeding to determine whether the administrative officer had a reasonable basis for the exercise of judgment and whether he acted within the powers granted to him.

There remains the ultimate question. May the judiciary be authorized by statute to review the executive officer’s determination on the merits, to substitute, in a proceeding *de novo*, its own judgment for that of the officer, and to reverse or modify his decision as it sees fit?

It is suggested that this would probably amount to an attempt to authorize the judicial branch of the government to interfere in too great a degree with a power properly belonging to the executive department, and to impose upon the court a purely administrative function. If the Attorney General’s decision is but a part of the process of creating a municipal bonded indebtedness, and therefore an administrative task, the court’s decision, now substi-

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tuted for his, must be of the same nature and significance. It becomes a part of the same process and performs the same function.

In view of the doctrine of the separation of powers, however, there can probably be no valid review by the courts of the merits of an administrative decision, and a substitution of the judiciary’s independent judgment for that of the administrative tribunal on the issues raised, unless the court by the Constitution either has or can be given original jurisdiction over the particular type of subject matter in question, and the power to carry on the same governmental service.¹⁵

If, as is true with reference to circuit courts in West Virginia, under the Constitution,¹⁶ a particular court may be given administrative powers, that court may probably be authorized to try de novo the matter originally decided by the administrative officer. It is suggested, however, that this is the only type of court that can be given such jurisdiction and that therefore the type of judicial control of the Attorney General’s action contemplated by the statute very probably violates the constitutional provisions relating to the separation of powers.

The Supreme Court of Appeals of West Virginia, upon which the statute imposes this power, has original jurisdiction, under the Constitution,¹⁷ in but three cases: mandamus, habeas corpus, and prohibition. It is difficult to see where the Court could be said to have original jurisdiction to test, in the same manner as the Attorney General, the validity of municipal bonds. The majority of the Court suggest that the Legislature has validly extended the Court’s jurisdiction in mandamus so as to authorize it to control the Attorney General’s judgment. The Supreme Court of Appeals has, however, clearly held that the legislature is without power, for the reasons indicated in this paper, to enlarge the Court’s original jurisdiction in mandamus so as to enable it to substitute its own judgment for that of an administrative agency or for that of the circuit court in a matter purely administrative in nature.¹⁸

¹⁶ Article VIII, § 12, “They shall also have such other jurisdiction, whether supervisory, original, appellate, or concurrent, as is or may be provided by law.”
¹⁷ Article VIII, § 3.
It is submitted that the majority of the Court seem to have failed to appreciate the nature of the problem at hand, and that Mr. Justice Ritz, in his dissenting opinion, sponsors what is apparently the better view. —M. T. V. H.

RECENT CASES.

ADVERSE POSSESSION—WHAT CONSTITUTES—OCCUPANCY UNDER A PAROL GIFT.—An oil and gas company agreed to convey one-half acre of surface land to a school board as soon as the land was measured in metes and bounds. In reliance on such promise the school board entered, built a school house and held possession for fifteen years without receiving the deed as promised. A controversy then arose between the parties as to the rights to the oil and gas under this land. The question was whether such entry and occupancy were adverse so that title to the land and to the oil and gas would be acquired under it. Held, No title was acquired. Bumpus et al v. Ohio Cities Gas Co., et al., 103 S. E. 62 (W. Va. 1920).

It is well settled authority that where one enters land pursuant to a parol gift and holds exclusive possession, such possession is adverse. Sumner v. Stevens, 47 Mass. 337; Schafer v. Hauser, 111 Mich. 622. Virginia is the only state holding such possession subordinate to the owner's title. Clarke v. McClure, 10 Gratt. 305 (Va.). In the principal case there was a promise without consideration and the relation existing between the parties was purely that of donor-donee. In support of its conclusion the West Virginia court cites two cases which hold that possession acquired under an executory contract does not form the basis of adverse possession. James Sons Co. v. Hutchinson, 79 W. Va. 389, 90 S. E. 1047; Hudson v. Putney, 14 W. Va. 561. Adverse possession is founded on a claim of ownership. Schafer v. Hauser, supra. Possession, under an executory contract, however, differs from that under a parol gift. The executory contract shows that the vendee has entered in recognition of the true owner and therefore he cannot hold adversely without some hostile assertion of ownership. Greeno v. Munson, 9 Vt. 37. But where there is a parol gift of the land, as in the principal case, the donee enters as owner and the donor admits such ownership. Though the court's decision on the question of adverse possession is open to criticism the actual holding in the case may be supported. The school board acquired