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Constitutional Law -- Delegation of Legislative Authority to Individuals

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in any county adjacent to said United States Army Post or Military reservation.[20]

North Carolina has a substantial military population. Whether our legislature, like Kansas, would like to liberalize the usual rule of domicile as to that population, requires considerations both political and sociological in nature. At any rate, the serviceman's problem illustrates but one of the strange results of the present divorce laws, having domicile as a requirement.[21]

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Constitutional Law—Delegation of Legislative Authority to Individuals*

In *Wilcher v. Sharpe*[1] the North Carolina Supreme Court was called upon to decide the constitutionality of a city ordinance prohibiting the erection of gins or mills "within the corporate limits of the town without the consent of all property owners in three hundred feet of the proposed site of building." The court held the ordinance invalid stating that where the effectiveness of an ordinance determining the use of property for a lawful purpose is conditioned upon the assent of private persons, such as owners of adjacent property, it is an unconstitutional grant of legislative power to private individuals.

This decision is in agreement with the often quoted rule that the power conferred by the constitution upon the legislature to make laws cannot be delegated by that body to individuals.[2]

In one of the earliest North Carolina cases considering this question, *Shaw v. Kennedy*,[3] where the town constable was given discretionary power to "take up and sell all hogs running at large on the city street,"

[20] KAN. GEN. STAT. § 60-1502 (1949). See also FLA. STAT. ANN. §21966 (1943); GA. CODE § 30-107 (1943); OKLA. STAT. tit. 12, § 1272 (1951).

[21] See Baer, *The Aftermath of Williams vs. State of North Carolina*, 28 N. C. L. REV. 265 (1950).

* The author is here primarily concerned with the status of the law as to the delegation of legislative authority to individuals in North Carolina. Reference to official groups is made only where it appears as a link in the chain of the development of this law by the court. Reference should be made, in conjunction with this article, to Note, 7 NCL REV. 315 (1929) where the delegation of legislative authority resulting from zoning ordinances is discussed.

[1] 236 N. C. 308, 72 S. E. 2d 662 (1952); *accord*, Eubank v. Richmond, 226 U. S. 137 (1912); State of Washington *ex rel* Seattle Title Trust Co. v. Roberge, 278 U. S. 116 (1928); Willis v. Town of Woodruff, 200 S. C. 266, 20 S. E. 2d 699 (1942). *Contra:* Whitaker v. Green River Coal Co., 276 Ky. 43, 122 S. W. 2d 1012, 1016 (1938); State *ex rel* Standard Oil Co. v. Combs, 129 Ohio St. 251, 194 N. E. 875 (1935); City of Spokane v. Camp, 50 Wash. 554, 97 P. 770 (1908).

[2] N. C. CONST. Art. I § 8, Art. II §1; Cox v. City of Kinston, 217 N. C. 391, 8 S. E. 2d 252 (1940). See I COOLEY'S CONSTITUTIONAL LIMITATIONS, 434 (1927); 11 AM. JUR., *Legislatures to Individuals*, 221; 70 ALR 1064.

[3] 4 N. C. 591 (1817); *accord*, People *ex rel* Bernat v. Bicek, 405 Ill. 510, 91 N. E. 2d 588 (1950); McCown v. Gose, 244 Ky. 402, 51 S. W. 2d 251 (1932).

the court said the ordinance was not in accord with the "laws of the land" and held the ordinance invalid seemingly on the grounds that it conferred arbitrary powers upon the constable. The court did not mention directly the fact that it granted legislative authority to an individual, but this may be taken to be the true meaning of the phrase "laws of the land." In 1853, however, in *Hill v. Bonner*[4] the court by way of deliberate dictum stated that any act tending to grant the people legislative authority would be void. Then in *Thompson v. Floyd* (1855)[5] the court stated, "The General Assembly can delegate any portion of its legislative functions to any man or set of men, acting either in an individual or corporate capacity." The court was very careful to continue its discussion, however, by pointing out that the individuals concerned by the act in question were acting merely as agents of the legislature to carry out its desired functions, and could not in any way "alter or amend the law in the slightest particular."[6] But the court at no time mentioned the dictum in the *Hill* case.

Four years later in *Manly v. City of Raleigh*[7] the court upheld an act of the legislature extending the city limits of Raleigh, which depended upon the approval of the mayor and commissioners for its becoming effective, and cited the language in the *Thompson* case in reaching its conclusion that the law did not violate the constitution.[8] The court further conclusively intimated that similar laws depending for validity on their acceptance by any individuals or groups of individuals, would not be unconstitutional.

By 1887 the trend toward liberal construction of the rule prohibiting delegation of legislative authority to individuals seemed well established.[9] In *State v. Yopp*[10] the court held valid a statute forbidding

[4] 44 N. C. 257 (1853); *accord,* Patterson v. Jefferson County, 238 Ala. 442, 191 S. E. 681 (1939); See Daigh v. Schaffer, 23 Cal. App. 2d 449, 73 P. 2d 927 (1937), (holding a grant of judicial authority to an individual invalid).

[5] 47 N. C. 313, 315 (1855); *cf.* Cody v. City of Detroit, 289 Mich. 499, 286 N. W. 805 (1939) (where the court held the consent of an individual being used for no greater purpose than to waive a restriction which legislative authority created, is within constitutional limitations).

[6] The statute in question made it possible for a majority of the the Justices of the Peace in Robeson County by agreement to abolish jury trials by the county courts within their county—remarkably similar to the grant declared unconstitutional in the principal case.

[7] 57 N. C. 370 (1859); *cf.* Yick Wo v. Hopkins, 118 U. S. 356 (1886) (where the court states: "The very idea that one man may be compelled to hold . . . any material right essential to the enjoyment of life at the will of another is intolerable.").

[8] The court, however, in reference to Hill v. Bonner, at p. 377, stated in speaking of this type legislation: "although it may be an abuse of power greatly to be deprecated as tending to subvert the principles of our representative form of government, still the power has been granted, and it is not the province of one branch of the government to correct the supposed abuses of the other."

[9] Cain v. Commissioners, 86 N. C. 8 (1882); State v. Chambers, 93 N. C. 600 (1885) (recognizing the validity of contingent legislation depending on majority approval by voters before becoming enforceable law). *Cf.* N. C. GEN. STAT. 518-

the use of certain type vehicles on a Wilmington company road without "the express permission of the superintendent of said road," saying this was a police regulation and the superintendent an agent of the law. The statute contained no criteria for the exercise of this discretion, and the court, taking for granted that it would be used "honestly, fairly, reasonably and without prejudice," would likely have held it unconstitutional had there appeared an abuse of the power granted.[11] The apparent question of delegation of legislative authority to individuals was not discussed.

In 1892 the famous case of *State v. Tenant*[12] decided the constitutionality of an Asheville ordinance prohibiting the "building, addition to, or improvement upon" any building in the city without first obtaining the permission of the city aldermen. The ordinance was held invalid as subjecting "the right of property to the despotic will of aldermen."[13] This decision would indicate a reversion on the part of the court to its original view requiring strict interpretation of the rule against delegation of legislative authority, if the circumstances in the case under consideration did not differ essentially from those found expressing the more liberal attitude of the court. In the immediate case the aldermen had refused an Asheville hospital permission to enlarge its facilities without stating reasons for so doing. The court relied on this apparent "abuse of discretion" as a grounds for reaching its desired conclusion. A similar decision would no doubt have resulted had the aldermen been "private individuals" as was dealt with in the principal case.

At this same term, in *State v. Barringer,*[14] a statute prohibiting the manufacture of. liquor within three miles of Barium Springs Orphanage without the written consent of the Orphanage superintendent was held valid, the court rationalizing and saying that even if that portion of the statute requiring the superintendent's consent were in-

61 (granting option as to the operation of county liquor stores to majority of voters in county to be affected).

[10] 97 N. C. 477, 482, 2 S. E. 458 (1887); *cf.* City of Cairo v. Coleman, 53 Ill. App. 680 (1894); Bill v. City of Goshen, 117 Ind. 221, 20 N. E. 115 (1889); Town of Trenton v. Clayton, 50 Mo. App. 535 (1892) (ordinances granting mayor or other official arbitrary power to approve or withhold licenses were held invalid).

[11] State v. Austin, 114 N. C. 855, 19 S. E. 919 (1894); State v. Hundley, 195 N. C. 377, 142 S. E. 330 (1928) (emphasizing the importance of prohibiting the abuse of discretion allowed in city ordinances). *Accord,* Duffy v. Hurley, 402 Ill. 562, 85 N. E. 2d 26 (1949).

[12] 110 N. C. 609, 14 S. E. 387 (1892).

[13] *Accord,* Kellerman v. City of Philadelphia, 139 Pa. Super. 569, 13 A. 2d 84 (1940). *Cf.* Thorpe v. Mayor, 13 Ga. App. 767, 79 S. E. 949 (1913) (where the court held ordinance granting city official power to refuse or grant a license at his discretion to be valid, but warned against the "unreasonable" use of such discretion).

[14] 110 N. C. 525, 14 S. E. 781 (1892). *Cf.* Beacon Liquors v. Martin, 279

valid, this would not mean the entire statute was bad; thus the prohibition would be effective and the same result, as to the manufacturer, reached.[15] During this year the court also drew the distinction between a grant of "power to adopt rules and regulations to carry into effect a law already passed" and a grant of "power to pass a law,"[16] but this distinction was not mentioned in the *Barringer* case.

In 1916 the court in *State v. Bass*[17] held an ordinance unconstitutional which prohibited any person from building a privy or stable in closer proximity to his neighbor's house than his own. Although the court quoted with approval the words of the Attorney General describing the ordinance as a grant of legislative authority to individuals by the town commissioners, the ordinance was held invalid principally on the grounds that it did not operate equally on all people. Following this decision in 1925 the court restated the general rule that legislative authority cannot be delegated, but the power to determine some fact or state of things upon which the law makes or intends to make its own action depend is valid.[18]

However, in the well reasoned case of *Bizzel v. City of Goldsboro*[19] the court once again found a seeming abuse of discretion on the part of city aldermen. City ordinances prohibiting the erection of gasoline filling stations without first obtaining the consent of the board of aldermen were held invalid as failing to prescribe a uniform rule for the granting of such permits and thus permitting discrimination against some property owners. The question of improper delegation of legislative authority to individuals was not discussed; the court apparently

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Ky. 468, 131 S. W. 2d 446 (1939) (where court reached same result on basis that legislation involved was contingent, and present social complexities warrant more liberal holdings concerning the delegation of legislative authority to individuals).

[15] It is interesting to note the similarity between the statute then under consideration and G. S. 116-42 (1794) and G. S. 116-43 (1824). These more encompassing sections, which have apparently gone uncontested to the present day, require the consent of the University president to "set up, maintain or keep in Chapel Hill, or within five miles thereof" any public billiard table, bowling alley, etc., or to operate any other games of chance or skill, or ". . . exhibit . . . any dramatic recitation, . . . or any concert, serenade or performance in music, singing or dancing. . . ."

[16] Atlantic Express Co. v. Railroad, 111 N. C. 463, 16 S. E. 393 (1892). See also, Morgan v. Stewart, 144 N. C. 424, 57 S. E. 149 (1907); State v. Railroad, 141 N. C. 846 (1906).

[17] 171 N. C. 780, 87 S. E. 972 (1916); *accord,* City of St. Louis v. Russell, 116 Mo. 248, 228 S. W. 470 (1893). *Contra,* City of Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853 (1895).

[18] Durham Provision Company v. Daves, 190 N. C. 7, 128 S. E. 593 (1925); State v. Garner, 158 N. C. 630, 74 S. E. 458 (1912); *cf.* Hollingsworth v. State Board of Barber Examiners, 217 Ind. 373, 28 N. E. 2d 64 (1940); Revne v. Trade Commission, 192 P. 2d 563 (Utah, 1948) (where statutes providing for minimum price agreements and opening and closing hour agreements between barbers upon approval by 80% of the barbers concerned were held invalid).

[19] 192 N. C. 348, 135 S. E. 50 (1926).

conceding the authority of city officials to enforce similar requirements providing they were not discriminatory. In a strong and able dissent Chief Justice Stacy, who was of the opinion that no constitutional boundary had been invaded, reasoned that discretionary powers were a necessity in our increasingly complex society. This dissent, of course, reaffirms the doctrine expressed in *State v. Yopp* sanctioning discretionary power in officials.

Ely Lilly Co. v. Saunders,[20] decided in 1929, held price fixing contracts between wholesalers and retailers valid and held the statute involved to "delegate nothing" saying it was complete upon leaving the hands of the legislature. The court quoted with approval 11 Am. Jur., p. 933, as follows: "The statute is not a delegation of power to private persons to control the disposition of property of others, because the restriction, already imposed with the knowledge of the prospective reseller runs with the acquisition of the purchased property and conditions it." A strong dissent by Justice Barnhill, however, seems to present a valid criticism that this is an improper delegation of authority.

In 1948, *James v. Sutton*[21] decided that the statutory zoning power of a governing body of a municipality cannot be delegated to a board of adjustment; therefore, a decision by the lower court that a "nonconforming use" could be made of certain property, if approved by the board, was held in error, the court feeling that this would empower the board to amend or change, rather than abide by, the law.

Thus the status of the North Carolina law concerning the grant of legislative authority to individuals seems to be far from settled and inflexible. Although the principal case unequivocally states that legislative authority will not be delegated to "private individuals," it is questionable as to what extent "private" may be taken. The earlier North Carolina cases approving the apparent use of legislative authority by an Orphanage superintendent, or the superintendent of a company roadway were not, as appears from the reported case, considered by the court in the principal decision. It would seem difficult, to say the least, to adjudge such persons as other than private individuals. Further, where the legislative grant has been to officials rather than "private" persons, the court has generally upheld the grant unless an abuse of the power granted is shown; or, as in the principal case, the court believes an opposite result would be more desirable after consideration of the circumstances involved. The court in the past, as it probably

[20] 216 N. C. 163, 177, 4 S. E. 2d 528 (1939).

[21] 229 N. C. 515, 50 S. E. 2d 300 (1948); *accord*, 226 N. C. 107, 37 S. E. 2d 128 (1946). *But see*, Washington v. Hammond, 76 N. C. 33 (1877) (where court says municipal ordinances must be "in harmony with the general laws of the state."). *Cf.* Goreib v. Fox, 145 Va. 554, 134 S. E. 914 (1927), *cert granted*, 274 U. S. 603 (1927) (where court approved and lauded the grant of "some discretion" to city officials).

will in the future, has, along with other principal jurisdictions, engaged quite frequently and adeptly in the art of verbal rationalization to achieve an equitable end despite the general rule against the delegation of legislative authority to an individual.

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Criminal Law—Former Jeopardy—Effect of Mistrial Resulting from Prosecutor's Inability to Proceed

Where the state's principal witnesses refused to testify on the ground of self-incrimination, the trial court declared a mistrial over the defendant's objection. Subsequently, when the state was able to procure the testimony of the witnesses the defendant was tried by a new jury and convicted of unlawful secret assault over his objection that he had been in jeopardy at the first trial. The North Carolina Supreme Court affirmed[1] the conviction and certiorari was granted by the United States Supreme Court wherein it was held in a five to two decision that the declaring of a mistrial and requiring the defendant to be presented to another jury, in accordance with North Carolina practice, was not a violation of the due process clause of the Federal Constitution.[2]

The Federal[3] and most state[4] constitutions guarantee that a person shall not twice be in jeopardy for the same offense. In those states where the constitution is silent, former jeopardy is a part of the common law,[5] but it is not one of the privileges and immunities protected by the Fourteenth Amendment.[6] By the greater weight of authority jeopardy attaches within the constitutional provision or the common law at the time a proper jury is impaneled and sworn to hear the evidence.[7] Discharge of the jury thereafter absent manifest legal necessity for so

[1] State v. Brock, 234 N. C. 390, 67 S. E. 2d 282 (1951).
[2] Brock v. State of North Carolina, 73 S. Ct. 349 (1953).
[3] U. S. CONST. AMEND V.
[4] 1 BISHOP, CRIMINAL LAW §981 (9th ed. 1923).
[5] The Constitutions of Connecticut, Maryland, Massachusetts, North Carolina, and Vermont do not contain prohibitions against double jeopardy; however, each of these states has the prohibition as part of its common law. State v. Benham, 7 Conn. 414 (1829); Gilpin v. State, 142 Md. 464, 121 Atl. 354 (1923); Commonwealth v. McCan, 277 Mass. 199, 178 N. E. 633 (1931); State v. Clemmons, 207 N. C. 276, 176 S. E. 760 (1934); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934). Eight states, because of specific constitutional provisions, hold that there must be an acquittal or conviction before jeopardy attaches. See A. L. I., *Administration of the Criminal Law*, Commentary to § 6 (Proposed final draft for 1935) for a complete listing of the Constitutional provisions.
[6] In Palko v. State of Connecticut, 302 U. S. 319 (1937), the state appealed pursuant to a Connecticut statute whereupon a reversal for errors of law was obtained. It was held that the statute was constitutional since the due process clause of the Fourteenth Amendment does not protect an individual against double jeopardy in a prosecution by a state. Hence, the Connecticut statute here in question does not necessarily violate the Fourteenth Amendment because a similar act of the federal government would violate the Fifth Amendment.
[7] 22 C. J. S. *Criminal Law* § 241 n. 64 (1940).