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Administrative Law and the Separation of Powers

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His has been the last act which increased the danger and he is responsible for any injury resulting therefrom. This does not rest on the theory of a duty to complete, but on the obligation not to create a danger which had heretofore not existed.

A fortiori the argument becomes the stronger if in repairing he creates a danger in some part of the premises distinct from the one he is repairing. Thus his liability is for active, creative acts of negligence and not merely for passive omission to completely remove defects.

To summarize, the rule that a landlord who gratuitously repairs premises is liable for damage only if he has misrepresented the condition of the repairs, or has created a new danger, or enlarged an old, seems amply supported by judicial opinion and legal principle [26] and is a just and fair one.

IRVING L. WHARTON.

ADMINISTRATIVE LAW AND THE SEPARATION OF POWERS.

That the law is a living organism capable of adaptation to the ever-increasing complexities of the modern social and political system is well illustrated in the development of that branch of jurisprudence that is termed administrative law.

Administrative tribunals are public officers and commissions which in addition to their primary executive or delegated legislative power, have incidental judicial power, that is, power to hear and determine causes. Administrative law embraces the principles applied by the courts in reviewing the determinations of these tribunals.

Fundamental in administrative law is the principle that the jurisdiction of an administrative tribunal not being at issue or having been established, an appellate court will not interfere with the action of that tribunal unless it is arbitrary, unreasonable or capricious. If the administrative tribunal has jurisdiction, and has a reason for its determination, the appellate court will look no further; it will not substitute its judgment for that of the tribunal.[1] "Power to make the

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[26] AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF TORTS §232: "A lessor of land, who by purporting to make repairs thereon while the land is in the possession of his lessee or by the negligent manner in which he has made such repairs has, as the lessee neither knows nor should know, made the land more dangerous for use, is subject to liability for bodily harm caused thereby to the lessee and others upon the land in the right of the lessee."

[1] Hilton v. Merritt, 110 U. S. 97, 3 Sup. Ct. 548 (1888); Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349 (1903); U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644 (1905); Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155 (1909); People *ex rel.* New York & Queens Gas Co. v. McCall, 245 U. S. 345, 38 Sup. Ct. 122, *aff'g*, 219 N. Y. 84, 113 N. E. 795 (1916); People *ex rel.* Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891); Matter of Ormsby v. Bell, 218 N. Y. 212, 112 N. E. 747 (1916); People *ex rel.* Board of Education v. Graves, 243 N. Y. 204, 153 N. E. 49 (1926).

order and not the mere expediency or wisdom of having made it, is the question." [2]

The principle here stated has been applied by the Court of Appeals in several recent cases. In *Agoglia* v. *Mulrooney* [3] the Court upheld the Police Commissioner of the City of New York in his refusal to grant a license for a cabaret. The Commissioner was acting under an ordinance which prohibits the operation of a cabaret without a license issuable by him, and providing that no license shall be so issuable unless the place sought to be licensed "in the opinion of the Police Commissioner is a safe and proper place to be used as a cabaret." The petition showed that there were four poolrooms in the immediate neighborhood of the proposed cabaret, and also that there was a school within a few hundred feet. The Superintendent of Schools in a letter to the Commissioner had opposed the issuance of the license because of the nearness of the proposed cabaret to a school. The Police Commissioner considered these facts together with records and reports of the Police Department, "the exact purport of which" was not shown by the record, and refused to issue the license. The Court of Appeals affirmed an order denying a motion for a peremptory writ of mandamus, holding that "under the circumstances the refusal of the Commissioner of Police to issue the license can hardly be said to be capricious or unreasonable. The petitioner therefore has shown no clear legal right, and the Commissioner's opinion, rather than that of the court, must control."

In *Perlmutter* v. *Greene* [4] the Court of Appeals refused to restrain the State Superintendent of Public Works from erecting at a dangerous curve in a public highway a screen that shut off the view of the petitioner's billboard. After deciding that the Superintendent had jurisdiction, the Court held that he "may act reasonably in his discretion for the benefit of public travel in screening a billboard at a dangerous curve when by its enormity such a structure may divert the attention of the motorist from the road." In *Bloom* v. *Cruise* [5] the city clerk of New York refused the petitioner a permit to erect an electric sign after the petitioner had secured the approval of the Superintendent of Buildings and the Commissioner of Water Supply, Gas and Electricity in pursuance to an ordinance which provided that "All permits for illuminated signs shall be issued by the city clerk, upon application therefor, approved by the Commissioner of Water Supply, Gas and Electricity and the Superintendent of Buildings in the case of electric signs," on the ground that the proposed sign itself violated the law. The Court of Appeals upheld the city clerk. His duties are largely ministerial but "while his power to exercise dis-

[2] Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155 (1909).

[3] 259 N. Y. 462, 182 N. E. 84 (1932).

[4] 259 N. Y. 327, 182 N. E. 5 (1932).

[5] 259 N. Y. 358, 182 N. E. 16 (1932).

cretion is extremely limited he is not, on the facts before us, entirely without some measure of it."

When considering the determinations of a public service commission, the courts apply this general principle when the determination involves such matters as the issuance of a certificate of convenience and necessity,[6] the extension of service,[7] or the issuance and sale of securities.[8]

In *Public Service Interstate Transportation Co.* v. *Public Service Commission*[9] the Court of Appeals refused to interfere where the Commission had issued a certificate of convenience and necessity to a competitor of the petitioner, saying that the convenience and necessity of a proposed bus line and the granting of permission to operate it are matters which are within the discretion of the Commission. "The court cannot substitute its judgment for that of the Commission, but is limited to a determination whether the order of the Commission is in excess of its powers." In *People ex rel. New York & Queens Gas Co.* v. *McCall*[10] the Court of Appeals upheld an order of the Public Service Commission requiring an extension of service under a statute which gave the Commission power to require "reasonable extensions of service," where although it appeared that a fair return would not be earned at the outset on the fair value of the extension, it was not shown that the petitioner would not earn a fair return on the fair value of its entire property of which the extension would form a part. The Court of Appeals would not substitute its judgment of what was reasonable for the determination of the Commission where the order of the Commission violated no rule of law. In affirming this decision, the Supreme Court of the United States said that it would examine the records as far as necessary to determine whether any constitutional right claimed has been denied, but that "it has not the authority to substitute its own judgment for that of an administrative commission as to the wisdom or policy of an order complained of, and will not analyze or balance the evidence before the commission for the purpose of determining whether it preponderates for or against the conclusion arrived at. * * * "[11]

But when a public service commission passes upon or fixes a rate to be charged by a public utility for its service, the court in reviewing the action of the commission no longer applies the test of whether the findings of the commission are arbitrary, unreasonable, or capricious, but rather whether these findings are reasonable in the independent judgment of the court. "In all such cases, if the owner

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[6] Public Service Interstate Transportation Co. v. Public Service Commission, 258 N. Y. 455, 180 N. E. 170 (1932).

[7] People *ex rel.* New York & Queens Gas Co. v. McCall, 219 N. Y. 84, 113 N. E. 795 (1916), *aff'd,* 245 U. S. 345, 38 Sup. Ct. 122 (1917).

[8] New York State Electric Corporation v. Public Service Commission, 260 N. Y. 32, 182 N. E. 237 (1932).

[9] 258 N. Y. 455, 180 N. E. 237 (1932).

[10] 219 N. Y. 84, 113 N. E. 795 (1916).

[11] 245 U. S. 345, 38 Sup. Ct. 122 (1917).

claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts: otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." [12] Similarly where administrative tribunals are empowered by statute to determine damages, the court will examine the evidence upon which the tribunal bases its findings.[13] In the first instance the courts have probably been influenced by the magnitude of the property rights involved, and in the second the process of the commission is so essentially judicial that the courts have not seen fit to relinquish their independent judgment even where the findings of the administrative tribunal are not arbitrary, unreasonable, or capricious.

Elementary textbooks state that one of the doctrines of government upon which the American governmental system is based is the doctrine of separation of powers, that is, that as far as practicable, legislative, executive, and judicial powers shall be exercised by different men or groups of men, to the end that there may be a government of laws rather than of men. Thus the Federal Constitution vests all legislative power in the Congress,[14] the executive power in the President,[15] and the judicial power in the Supreme Court of the United States.[16] Separation of powers in the state governments is not required by the Federal Constitution,[17] but all state constitutions require it to varying extents. In the constitution of the State of New York it is provided that the legislative power is vested in the state legislature [18] and the executive power in the governor.[19] The judicial power is not expressly vested in the courts of New York by the state constitution, but, on the other hand, such power is not vested elsewhere, and the Court of Appeals for all practical purposes proceeds on the assumption that the judicial power is vested in it.[20] An amendment to the state constitution that would expressly vest the judicial power in the Court of Appeals was reported [21] to the legislature in 1922, but that amendment has not been made to the constitution.

This doctrine of separation of powers cannot, of course, be rigorously applied in all cases.[22] It has always been recognized that

[12] Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527 (1920).

[13] People *ex rel.* Dawley v. Wilson, 232 N. Y. 12, 133 N. E. 45 (1921).

[14] ART. I §1 U. S. CONSTITUTION.

[15] ART. II §1 U. S. CONSTITUTION.

[16] ART. III §1 U. S. CONSTITUTION.

[17] Calder v. Bull, 3 Dall. 386 (U. S. 1798); Michigan Central Railway Co. v. Powers, 201 U. S. 245, 26 Sup. Ct. 459 (1905).

[18] ART. III §1 N. Y. CONSTITUTION.

[19] ART. IV §1 N. Y. CONSTITUTION.

[20] People v. Howland, 155 N. Y. 270, 49 N. E. 775 (1898); People v. Kennedy, 154 App. Div. 558, 139 N. Y. Supp. 896, *aff'd*, 207 N. Y. 533, 101 N. E. 442 (1913).

[21] Report of Judiciary Constitutional Convention of 1921 to the New York Legislature, Legislative Document No. 37 (1922).

[22] 2 WILLOUGHBY, THE CONSTITUTION, c. LXIII.

each department to facilitate its procedure and to maintain its independence of the other departments must to some extent exercise powers that, strictly speaking, belong to other departments. Thus, for instance, the legislature must often be judicial in its investigations preliminary to legislation, and the executive and judicial departments must make rules concerning procedures that are legislative in character. But clearly these reasons of convenience and independence of action do not explain the length to which administrative tribunals have been permitted to exercise judicial power. Rather this is to be seen as one phase of the reaction against that kind of legal administration that had for its ideal fixed rules which applied to given facts through a mechanical process of reasoning would inevitably produce the same result.[23] Appellate courts when confronted with the problem whether rule or discretion should govern their attitude toward the determination of administrative tribunals allowed these tribunals a wide range of discretion. The adoption of this attitude by the courts was based on recognition that a large and increasing number of problems require for their solution special knowledge, skill, and experience that the courts do not have. Expediency and the best interests of society indicated that the solution of these problems should be intrusted to administrative tribunals having the peculiar qualifications necessary to the task. "In the government of the affairs of a great municipality many powers must necessarily be confided to the direction of its administrative officers, and it can be productive only of mischief in the treatment of such questions to substitute the discretion of strangers to the power in place of that of the officers best acquainted with the necessity of the case and to whom the legislature has specially confided their exercise." [24]

Thus by a process of judicial self-limitation [25] the courts have established the principle that, in general, administrative tribunals essentially executive or legislative in character may exercise a wide range of discretion in the exercise of their judicial power, subject only to the requirement that their determination shall not be arbitrary, unreasonable or capricious. As a result such administrative tribunals have developed and have come to fill an important place in American federal and state governments—and this has been accomplished without any violent disavowal of the doctrine of separation of powers which is so prominent in the American governmental system as discussed in the elementary textbooks.

T. J. MATTHEWS.

[23] Note (1920) 33 HARV. L. REV. 972.

[24] People *ex rel.* Schwab v. Grant, 126 N. Y. 473, 482, 27 N. E. 964, 967 (1891).

[25] Finkelstein, *Judicial Self-Limitation* (1924) 37 HARV. L. REV. 338, *Further Notes on Judicial Self-Limitation* (1925) 39 HARV. L. REV. 221. *Contra:* Weston, *Political Questions* (1924) 38 HARV. L. REV. 296.