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Constitutional Law--Judicial Review of Legislative Determination as to Fact

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Mr. Justice Butler, concurring in the result in the instant case, complains that this does not seem to be the proper occasion for abolishing the negative order doctrine.[19] Whether or not this is so, the doctrine has rightly been repudiated.

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CONSTITUTIONAL LAW—JUDICIAL REVIEW OF LEGISLATIVE DETERMINATION AS TO FACT

The state constitution[1] authorized the general assembly to establish new judicial districts "having due regard to territory, business, and population." A new district was established by the legislature and suit was brought to enjoin the newly appointed judge thereof from discharging any of the duties of his office, on the ground that the general assembly failed to exercise due regard for territory, business, and population. Defendant demurred to the petition, alleging that the court had no authority to review the legislative finding as to those facts. The demurrer was overruled on the basis that it was the duty of the court to determine whether the actual facts justified the creation of the new district. *Willis* v. *Jonson*, 275 Ky. 538, 121 S. W. (2d) 904 (1938).[2]

The Kentucky court apparently decides whether or not it will review the legislative determination of fact, by investigating whether or not the act was passed in pursuance of an express authority or duty granted or placed upon the General Assembly by the Kentucky Constitution. If the legislature has power to act only in certain contingencies, the court will look to see if such contingency exists;[3] but

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tion", see McAllister, *Statutory Roads to Review of Federal Administrative Orders*, (1940) 28 Calif L. Rev. 129, 143–150; Note (1939) 18 Chicago-Kent L. Rev. 74, 79 et seq.

[19] By "administrative finality" Mr. Justice Frankfurter means that findings of fact of an administrative agency will be conclusive as to such facts. 307 U. S. 125, 142, 59 S. Ct. 754, 763, 83 L. ed. 1147, 1159 (1939). Thus, where the Interstate Commerce Commission determines that a reshipping privilege granted by a carrier is an undue preference not allowed by law, the court has no power to disturb that finding. U. S. v. Louisville & N. Ry., 235 U. S. 314, 35 S. Ct. 113, 59 L. ed. 245 (1914). *Accord:* I. C. C. v. Illinois C. Ry., 215 U. S.. 452, 30 S. Ct. 155, 54 L. ed. 280 (1909); I. C. C. v. Union P. Ry., 222 U. S. 451, 32 S. Ct. 108, 56 L. ed. 308 (1911). For further discussion of "administrative finality" see McAllister, *Statutory Roads to Review of Federal Administrative Orders*, (1940) 28 Calif. L. Rev. 129; Note (1939) 18 Chicago-Kent L. Rev. 74.

[1] Rochester Telephone Corp. v. U. S., 307 U. S. 125, 146, 59 S. Ct. 754, 765, 83 L. ed. 1147, 1161 (1939).

[1] Ky. Const., Sects. 128 and 132.

[2] On a second appeal the court reviewed the evidence upon which the Legislature acted, and finding that it did not contradict the constitutional provision, affirmed the decision of the trial court. Willis v. Jonson, 279 Ky. 416, 130 S. W. (2d) 828 (1939).

[3] Zimmerman v. Brooks, 118 Ky. 85, 80 S. W. 443 (1904); Ragland v. Anderson, 125 Ky. 141, 100 S. W. 865 (1907); Scott v. McCreary, 148 Ky. 791, 147 S. W. 903 (1912); Nolan v. Jones, 215 Ky. 238, 184 S. W. 1054 (1926).

when the course of action of the legislature is unlimited by the Constitution, a judicial review thereof is beyond the authority of the court.[4]

Pursuant to this policy, in the present case the court, interpreting Section 128, read therein a limitation on absolute legislative discretion in the creation of a new judicial district, and proceeded to determine whether the General Assembly had acted in accordance with this restriction. Thus the court said (p. 545):

> "It was the duty of the Legislature in the creation of a new district to have due regard to territory, business, and population; and it is our duty to examine the facts in order to determine whether or not there was any evidence to support the legislative conclusion that a new district was necessary."

Just what is the duty placed upon the General Assembly by Section 128? The standard to which the Legislature must adhere is not so precise and concrete that it will admit only one conclusion, as is the case for example, in Section 138 providing that one county may constitute a district when it attains a certain population. In an application of that section of the Constitution, either a county has the requisite population or it has not, and a determination of that question is completely objective—capable of definite ascertainment—so that if the Legislature deems a county to have that number of residents it can be definitely shown that the assembly is right or that it is wrong. There is no room for differences of opinion.

Section 128 presents an entirely different problem. The limitation upon the legislative discretion is that there must be "due regard". No certain facts must exist nor is it necessary to comply with specific requirements. There is no standard by which the propriety of the legislative action can be gauged, for there is no precise criterion to guide the court. It cannot be said definitely either that the Legislature had or that it did not have due regard, for that is an abstract term subject to wide differences of interpretation. The sole restriction upon action of the Legislature is that it have "due regard for territory, business, and population", and when it passes an act under this section, there is in effect a declaration that it has had such due regard. The limitation is subjective and a review by another body is not contemplated by the state Constitution.[5]

When the court presumes to exercise a review of the General Assembly's determination that it has had due regard in enacting a bill, the court in reality is substituting its own conception of "due

[4] Moore v. City of Georgetown, 127 Ky. 409, 105 S. W. 905 (1907); Richardson v. McChesney, 128 Ky. 363, 108 S. W. 322 (1908)

[5] Does not this analysis accord with the court's interpretation of Section 156 of the Kentucky Constitution, to the effect that since that section provides that the Legislature shall act upon evidence in the classification of cities and towns, the legislative finding is not subject to judicial review? Green v. Comlth., 95 Ky. 233, 16 K. L. R. 161, 24 S. W. 610 (1894); Griffin v. Powell, 143 Ky. 276, 136 S. W. 626 (1911). Does this differ from the requirement in Section 128 that the Legislature shall have due regard?

regard" for that of the Legislature in the face of the constitutional provision which to all intents and purposes contemplates a subjective determination. Thus it would seem that under this section of the Kentucky Constitution, the question of whether or not the Legislature exercised due regard for territory, business, and population is solely for that body, and its determination upon that matter should not be subject to a review of a co-ordinate branch of the government.

B. H. HENARD.

ADMISSIBLE EVIDENCE OF VICIOUSNESS OF DOMESTIC ANIMAL

Plaintiff, seeking damages for personal injuries due to the bite of an allegedly vicious dog, was not permitted to offer evidence that the dog had severely injured a bird dog and was vicious toward other dogs, or that the dog had a general reputation for viciousness. The court said: "The first (plaintiff's exception to the rejection of evidence that defendant's dog had bitten other dogs) is quite a novel proposition. The instant question was the dog's propensity to attack a human. . . . In an action for personal injury it is not sufficient to show that the owner of a dog had knowledge that it was accustomed to bite other animals." Fowler v. Helck, 278 Ky. 361, 128 S. W. (2d) 564 (1939).

The popular belief that every dog is entitled to one bite is not supported by authority. It is not essential to show that the dog has actually bitten some person and that the owner is cognizant of that fact, provided the owner has seen or heard enough to convince a man of ordinary prudence that the animal is inclinded to commit the class of injuries involved. The question is whether the notice is sufficient "to put the owner on his guard, and to require him to anticipate the injury which has actually occurred."[1] *Goode* v. *Martin*[2] held that the owner's knowledge of the dangerous character of his dogs might be inferred from his habit of tying them by day. The *Restatement of the Law of Torts* makes the possessor of a domestic animal liable where he has reason to know (knows or from facts known to him should know) that the animal has dangerous propensities abnormal to its class.[3]

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[1] Reynolds v. Hussey, 64 N. H. 64, 5 Atl. 458 (1886). See Rider v. White, 65 N. Y. 54, 22 Am. Rep. 600 (1875), where defendant who knew that his seven large watch dogs rushed out and pursued passersby, and had posted a sign "Beware of Dogs" was held to have had knowledge of their propensity to attack and bite mankind.

[2] 57 Md. 606, 40 Am. Rep. 448 (1881) (the defendant's dogs were loosed at night to guard his property and were personally tied each morning by the defendant).

[3] Section 509. Brune v. De Benedetty, 261 S. W. 930 (Mo. App. 1924), seems to support this section. The plaintiff based his case upon the viciousness of the defendant's dog superinduced by rabies. The court said that defendant knew the propensity of a rabid dog to attack mankind.