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Constitutional Law-Conditional Legislation-Delegation to Judiciary Magistrates Court Act

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RECENT CASE NOTES

CONSTITUTIONAL LAW—CONDITIONAL LEGISLATION—DELEGATION TO JUDICIARY—MAGISTRATES COURT ACT¹—The Act provides forty freeholders may petition the circuit court judge requesting appointment of magistrates. After petition the judge holds a hearing. If he finds services of magistrates are needed he may, in his discretion, appoint magistrates. Petitioners, freeholders of Beech Grove, petitioned the Marion Circuit Court for appointment of two magistrates. The appointment was denied; the court holding the Act unconstitutional. Held, reversed. The Act is valid. *In re Petition for the Appointment of Magistrates for the City of Beech Grove*. (Ind. 1940), 24 N. E. (2d) 773.

To meet variation in local conditions a statute may require certain governmental action be invoked by petition to a public officer. If the officer is merely to verify the petition for formal requisites of the statute and is compelled to exercise authority upon application of the petitioners, the action of private parties is tantamount to final action; consequently such statute is generally invalid as an improper delegation of legislative authority to private groups.² Where the petition is, however, a mere initiatory procedure, discretion to act or not to act being left with an officer competent to exercise it, the petition is regarded as a condition or contingency; the delegation being to the governmental officer rather than the petitioners and if the officer is subject to the usual statutory standard and judicial review the statute is valid.³ There is, of course, some discretion in the petitioners since they determine whether or not a petition is submitted, but group participation seems permissible if consent of the governmental officer is required at some point in the process as a condition precedent to operation of the statute.⁴

¹ Ind. Stat. (1939), Ch. 164, p. 753; Burns Ind. Stat. (1933), §§ 4-3801—4-3809.

² *Eubank v. Richmond* (1912), 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156 holds this type of statute invalid as a violation of the 14th Amendment of the U. S. Constitution even though the official body had wide discretion in fixing the building line after petition submitted; *Maryland Milk Producers v. Miller* (1936), 170 Md. 81, 182 Atl. 432, law vesting commission with power to establish prices dependent on request by substantial proportion of producers, held invalid as delegating legislative authority; *Rowe v. Ray* (1930), 120 Neb. 118, 231 N. W. 689; *Morton v. Holes* (1908), 17 N. D. 154, 115 N. W. 256; Jaffe, LAW MAKING BY PRIVATE GROUPS (1937), 51 Harv. L. Rev. 201; Note (1937), 37 Col. L. Rev. 447. Cf. *Agr. Prorate Comm. v. Superior Court* (1936), 5 Cal. (2d) 550, 55 P. (2d) 495 holding valid the elaborate California prorate scheme, which gives the farmers not only power to initiate but also concurrent power to settle the regulation and powers of administration.

³ *Miller v. Schoene* (1928), 276 U. S. 272, 48 S. Ct. 246, 72 L. Ed. 568; *City of Des Moines v. Manhattan Oil Co.* (1921), 193 Iowa 1096, 184 N. W. 823; *Union P. R. Co. v. Leavenworth Co.* (1913), 89 Kan. 72, 130 Pac. 855; *State ex rel. Spencer v. Drainage Dist.* (1927), 123 Kan. 191, 254 Pac. 372 (drainage district proceedings); Note, 117 A. L. R. 276; Note, 70 A. L. R. 1064; Jaffe, LAW MAKING BY PRIVATE GROUPS (1937), 51 Harv. L. Rev. 201; Note (1932), 32 Col. L. Rev. 80.

⁴ *Maryland Co-operative Milk Producers v. Miller* (1936), 170 Md. 81, 182 Atl. 432; *Agr. Prorate Comm. v. Superior Court* (1936), 5 Cal. (2d) 550, 55 Pac. (2d) 495; Jaffe, LAW MAKING BY PRIVATE GROUPS (1937), 51 Harv. L. Rev. 201.

Where authority to act upon a petition is vested in a judicial rather than an administrative officer there is the additional difficulty that courts generally deny themselves the right to be vested with executive or legislative functions.⁵ The prevailing view prohibits delegation of non-judicial functions to the judiciary.⁶ Some courts have, however, allowed delegation of administrative functions reasonably incidental to the fulfillment of judicial duties;⁷ but rate making,⁸ approval of plans for street railway,⁹ valuation of property for taxation,¹⁰ and repeal of corporate charters¹¹ are universally held legislative functions not delegable to the judiciary.

In conditional legislation the weight of authority sustains statutes vesting courts with ministerial fact-finding duties in establishing facts required by the legislature as a condition precedent to operation of a law, but holds invalid laws vesting in courts discretion in determining the wisdom of a proposed application of a statute because the court is required to determine questions of economic and political expediency which are of legislative cognizance and under the separation of powers doctrine must be determined by the legislature or some body having legislative or administrative power to which the determination is delegated.¹² The same cannot be said of fact-finding as that function is judicial.¹³

⁵ *Report of the Special Committee on Administrative Law*, 61 Amer. Bar Assoc. Reports (1936), 721, reprinted in 4 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938), 430.

⁶ *Hodges v. Public Service Comm.* (1931), 110 W. Va. 649, 159 S. E. 834; *Borreson v. Department of Public Welfare* (1938), 368 Ill. 425, 14 N. E. (2d) 485, noted (1939), 37 Mich. L. Rev. 639; *Chicago & N. W. R. Co. v. Bauman* (C. C. A. 8, 1934), 69 F. (2d) 171, cer. den. 292 U. S. 632, 54 S. Ct. 641, 78 L. Ed. 1485; In re Assessment of Kansas City So. R. (1934), 168 Okla. 495, 33 P. (2d) 772; *Searle v. Yensen* (1929), 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257. Analogous Indiana cases indicate delegation is proper when the court acts in a judicial capacity, *Levengood v. City of Covington* (1924), 194 Ind. 633, 144 N. E. 416; *Town of St. John v. Gerlack* (1926), 197 Ind. 289, 150 N. E. 771; *Water Works Co. of Indianapolis v. Burkhart* (1872), 41 Ind. 364.

⁷ *Rosenthal v. McGolderick* (1939), 280 N. Y. 11, 19 N. E. (2d) 660. Cf. *Town of Falls Church v. Arlington Co. Board* (Va. 1936), 184 S. E. 459.

⁸ *Colorado Tel. Co. v. Wilmore* (1913), 53 Colo. 585, 129 Pac. 204.

⁹ *Appeal of Norwalk St. Ry.* (1897), 69 Conn. 576, 38 Atl. 708.

¹⁰ *Chicago & N. W. R. Co. v. Bauman* (C. C. A. 8, 1934), 69 F. (2d) 171, cer. den. 292 U. S. 632, 54 S. Ct. 641, 78 L. Ed. 1485; In re Assessment of Kansas City So. R. Co. (1934), 168 Okla. 495, 33 P. (2d) 772.

¹¹ WILLIS, CONSTITUTIONAL LAW (1936), 140.

¹² "The question is did the law go into operation upon happening of a certain state of facts to be determined by the circuit court or does it authorize and require the court to go farther and not only determine facts, but pass its judgment upon question of legislative discretion," In re Incorporation of Village of North Milwaukee (1911), 93 Wis. 616, 67 N. W. 1033; *Udall v. Severn* (Ariz. 1938), 79 P. (2d) 347; In re Ruland (1926), 120 Kan. 42, 242 Pac. 456; *Honey Creek Drainage Dist. v. Farm City Inv. Co.* (1930), 326 Mo. 739, 32 S. W. (2d) 753; *Hodges v. Public Service Comm.* (1931), 110 W. Va. 649, 159 S. E. 834; *Searle v. Yensen* (1929), 118 Neb. 835, 226 N. W. 464, 69 A. L. R. 257; *Burnett v. Greene* (1929), 97 Fla. 1007, 122 So. 570. That the legislature "may condition the operation of the law on certain facts and submit to the courts the determination of those facts is well established," *Searle v. Yensen* (1929), 118 Neb. 835, 226 N. W. 464.

¹³ *Levengood v. City of Covington* (1924), 194 Ind. 633, 144 N. E. 416;

An early Indiana case¹⁴ held laws could not be made to take effect upon vote of a single locality, but later cases, following the weight of authority, have overruled that decision and now conditional legislation may be enacted providing for majority vote or petition of a certain number as a condition precedent to operation of a statute in any particular area.¹⁵ Based upon some loose notion of representative democracy the prevailing view, however, still denies power of the legislature to refer to the entire electorate the decision upon any proposed statute affecting the whole state.¹⁶

Indiana decisions permit delegation of power to determine facts,¹⁷ and where delegation is to the judiciary to conduct hearings and pass upon the sufficiency of a petition liberal results have been reached by holding that the court acts judicially.¹⁸

The principal case held courts were actually created by the General Assembly and the duty to appoint magistrates may be placed with circuit court judges. The latter proposition is supported by adequate authority and the court

Water Works Co. of Indianapolis v. Burkhart (1872), 41 Ind. 364; Punke v. Village of Elliott (1936), 364 Ill. 604, 5 N. E. (2d) 389; Maddy v. City Council City of Ottumwa (Iowa 1939), 285 N. W. 208; Lyon v. Payette (1924), 38 Idaho 705, 224 Pac. 793; Young v. Salt Lake City (1902), 24 Utah 321, 67 Pac. 1066.

¹⁴ Maize v. State (1841), 4 Ind. 342.

¹⁵ Edwards v. Housing Authority of Muncie (Ind. 1939), 19 N. E. (2d) 741; Johnson v. Board of Park Com'rs of Fort Wayne (1930), 202 Ind. 282, 174 N. E. 91; Sarlls v. State (1929), 201 Ind. 88, 166 N. E. 270; McPherson v. State (1909), 174 Ind. 60, 90 N. E. 610; State v. Gerhardt (1896), 145 Ind. 439, 44 N. E. 469; Thompson v. Peru (1860), 29 Ind. 305. That a certain law may be called into exercise by petition does not violate section 25, article 1 of the Indiana Constitution which provides that "no law shall be passed, the taking effect of which shall be made to depend upon any authority except as provided in this constitution," Booth v. State (1913), 179 Ind. 405, 100 N. E. 563, aff'd (1915), 237 U. S. 391, 35 S. Ct. 617. See generally, WILLIS, CONSTITUTIONAL LAW (1936), 138 ff. for a discussion of the problems and a collection of the authorities. See also, Baesler, *Decisions on Delegation of Legislative Power* (1935), 15 Bost. U. L. Rev. 507; Note (1937), 37 Col. L. Rev. 447.

¹⁶ People v. Barnett (1931), 344 Ill. 62, 176 N. E. 108, 76 A. L. R. 1044; Wright v. Cunningham (1905), 115 Tenn. 445, 91 S. W. 293; WILLIS, CONSTITUTIONAL LAW (1936), 137. Contra; In re Opinion of Justices (1936), 232 Ala. 60, 166 So. 710; Hudspeth v. Swayze (1920), 85 N. J. L. 592, 89 Atl. 780; State v. Parker (1885), 26 Vt. 357. Cf. WILLIS, CONSTITUTIONAL LAW (1936), 137 stating the majority rule does not rest upon good constitutional history nor upon philosophy. See also, 1 COOLEY, CONSTITUTIONAL LIMITATION, (8th ed. 1924), 238.

¹⁷ Financial Aid Corp. v. Wallace (Ind. 1939), 23 N. E. (2d) 472; Town of Walkerton v. N. Y. C. & St. L. R. Co. (Ind. 1939), 18 N. E. (2d) 799; Kryden v. State (1938), 214 Ind. 419, 15 N. E. (2d) 386, cer. den. (1939), 59 S. Ct. 154.

¹⁸ Levengood v. City of Covington (1924), 194 Ind. 633, 144 N. E. 416, stating that proceeding had upon the petition are of a judicial nature. The court passes upon the sufficiency of the reasons and that an appeal may be had; Water Works Co. of Indianapolis v. Burkhart (1872), 41 Ind. 364, the decision is somewhat limited, however, since it was an eminent domain proceeding and since land can be taken by eminent domain only for a public purpose the court had to pass upon the necessity of the work to justify the taking; Town of St. John v. Gerhack (1926), 197 Ind. 289, 150 N. E. 771.

was correct in its conclusion.¹⁹ It seems, however, that the duty to appoint magistrates and the duty to determine the need for a court are two separate functions. There is no court in actual existence or in actual operation in any county of the State until a petition is submitted and the judge determines the need for a magistrate court. It seems the Act is conditional legislation since a petition is required to invoke its operation. There is no delegation of authority to the petitioners because discretion is left with the judge; the petition being a mere initiatory procedure and sustained as a condition. The duty to determine the need for a court is given to the judge. If he acts merely in a fact finding capacity in determining this need the Act is valid because in determining facts he acts judicially. There would be no delegation of non-judicial functions. If the judge is, however, required to exercise a policy judgment as to the political expediency for a magistrate's court, just as the legislature would do, the cases indicate invalidity and it makes no difference that the authority vested covers a private or local matter. It is submitted the court in the principal case reached the correct result; but the decided cases, however, indicate it was unwarranted in concluding courts were actually created by the Act and that the judge's only duty was to appoint magistrates.

H. R. H.

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—COLGATE V. HARVEY.—Kentucky placed a property tax five times as great on out of state bank deposits as on deposits within the state. Upon the death of the plaintiff's decedent the state attempted to assess out of state deposits which were then disclosed. The plaintiff contested the tax on the ground that it was an improper classification and therefore violated the due process and equality clauses of the 14th Amendment, and that it was discriminatory and violated the privileges and immunities clause, citing *Colgate v. Harvey*¹ as authority. The Court of Appeals upheld the tax. Held, affirmed. The classification was proper and the privilege of depositing in out of state banks free from discriminatory taxes is not a privilege of United States citizenship. *Colgate v. Harvey* is overruled. *Madden v. Kentucky* (1940), 60 Sup. Ct. 406.

¹⁹ *City of Terre Haute v. Evansville, etc.*, R. Co. (1897), 149 Ind. 174, 46 N. E. 77; *City of Indianapolis v. State ex rel. Barnett* (1909), 172 Ind. 472, 132 N. E. 165; *Bemis v. Guirl Drainage Co.* (1914), 182 Ind. 36, 105 N. E. 496; *State ex rel. School City of South Bend v. Thompson* (1937), 211 Ind. 267, 6 N. E. (2d) 710, WILLIS, CONSTITUTIONAL LAW (1936), 151.

The exercise of the appointative power is theoretically an executive function. Appointments are now, however, made by all three departments of government; therefore the legislature, as a duty determining branch can assign the duty to appoint magistrates to the judiciary since selection is not otherwise provided for by the Constitution. *City of Indianapolis v. State ex rel. Barnett* (1909), 172 Ind. 472, 132 N. E. 165; *State ex rel. School City of South Bend v. Thompson* (1937), 211 Ind. 267, 6 N. E. (2d) 710; WILLIS, CONSTITUTIONAL LAW (1936), 151.

¹ *Colgate v. Harvey* (1936), 296 U. S. 404, 56 S. Ct. 252, 80 L. Ed. 299. Vermont placed a discriminatory tax on out of state loans and the Supreme Court held it an improper classification and invalid, but, apparently not too satisfied with this as a ground, said that even if the classification were proper it violated the privileges and immunities clause of the 14th Amendment.