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Constitutional Law--Administrative Law--Delegation of Powers--Public Authorities Law Section 553(5) Held Valid Despite Absence of Expressed Standards Limiting Discretion (People v. Malmud, 4 A.D.2d 681 (2d Dep't 1957))

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property implied that the restrictions were to continue in effect as to loans secured by personalty. This contention the Court renounced, noting that the early cases made no distinction between real and chattel mortgages and that the restrictions had therefore never applied. The Court also noted that the recent unsuccessful legislative attempt to validate unsecured loans[21] impelled an implication that the legislature presupposed the validity of loans secured by chattel mortgages by its failure to provide for them in the bill. The Court then held that the proscriptions of the "Restraining Acts" do not extend to chattel mortgages executed to secure a discounted loan and that both the mortgage and the notes are valid and enforceable.

The problem of the unsecured discounted loan still remains. The legislature attempted to remove all restrictions during its 1957 session.[22] However, the Governor vetoed the bills.[23] Lending by corporations is not prohibited. These loans do not compete with but, rather, supplement the lending function of the banks. Nor do they inflate currency by creating deposits. The only apparent difficulty remaining is a lack of protection against possible abuses. Therefore, a modification of the statutory scheme from prohibition to regulation would appear desirable.

CONSTITUTIONAL LAW — ADMINISTRATIVE LAW — DELEGATION OF POWERS — PUBLIC AUTHORITIES LAW SECTION 553(5) HELD VALID DESPITE ABSENCE OF EXPRESSED STANDARDS LIMITING DISCRETION. — The defendant, while driving through the Brooklyn Battery Tunnel, violated a traffic rule[1] promulgated by the Triborough Bridge and Tunnel Authority. Section 553(5) of the Public Authorities Law[2] gives to the Authority the power to make rules, subject to agreements with bondholders, for the use of their projects.

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[21] See A. Int. No. 4037, S. Int. No. 1952; A. Int. No. 4045, S. Int. No. 1954.

[22] *Ibid.*

[23] The Governor vetoed the bills, expressing a fear that, in the haste of the closing days of the session, the legislators may have failed to appreciate the full effect of the bills in their removal of such transactions from their traditional restriction to the banking realm and its consequent supervision. He also criticized the retroactive provision of the bills which would validate transactions declared by the Court of Appeals to have been illegal when they were consummated. Veto Message, MCKINNEY'S SESSION LAWS OF NEW YORK 1991 (1957).

[1] The defendant failed to comply with hand and voice signals, a violation of the RULES FOR THE REGULATION AND USE OF THE PROJECT, art. 4, § 3.

[2] ". . . [T]o make by-laws for the management and regulations of its affairs, and subject to agreements with bondholders, rules for the regulation of the use of the project and the establishment and collection of tolls thereon."

It also provides that violation of these rules will be a misdemeanor.[3] Special Sessions sustained a demurrer to the information, and ruled that the statute allowed an unknown, unnamed group, to wit, the bondholders, to decide what acts were to be crimes. The Appellate Division, in reversing, *held* the delegation valid and reasoned that the term "subject to the agreement of bondholders" referred *only* to financial requirements to secure their investments. Furthermore, although no standards limiting the agency's discretion to make rules appeared in the statute, it was sufficiently curtailed by an implied limitation of reasonableness. *People v. Malmud,* 4 A.D.2d 681, 164 N.Y.S.2d 993 (2d Dep't 1957).

Article 3, Section 1 of the New York State Constitution vests the legislative power in the Senate and the Assembly.[4] The maxim, *delegata potestas non potest delegari,* represents the proposition that this power may neither be re-delegated nor abandoned.[5] In addition, the legislature possesses administrative power which may be re-delegated to authorized public agencies.[6] The legislature may delegate to administrative officials the power to determine facts and conditions upon which the operation of a statute depends. They must not, however, delegate the power to make law.[7]

The line between what is a legislative and what is an administrative function is often thin. Thus in *People v. Ryan* [8] and *People v. Grant* [9] the courts struck down penal sanctions made pursuant to the Alcoholic Beverage Control Law of 1933.[10] The Board was empowered to make rules governing the sale of liquor.[11] The statute provided that violations of these rules would be crimes, "if the rule so provides." [12] The Administrator was thus empowered to assign

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[3] PUBLIC AUTHORITIES LAW § 553(5). "Violation of such rules shall be a misdemeanor punishable by a fine of not exceeding fifty dollars or by imprisonment for not longer than thirty days, or both." *Ibid.*

[4] This provision is similar to article one, section one, of the Federal Constitution, and similar legal principles apply. *Compare* Noyes v. Erie & Wyoming Farmers Co-op., 170 Misc. 42, 10 N.Y.S.2d 114 (Sup. Ct.), *aff'd,* 281 N.Y. 187, 22 N.E.2d 334 (1939), *with* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[5] For an informative article on the origin, development and its adaptability as an American Constitutional doctrine, see Duff and Whiteside, *Delegata potestas non potest delegari: a maxim of American Constitutional law,* 14 CORNELL L.Q. 168 (1929).

[6] See Darweger v. Staats, 267 N.Y. 290, 196 N.E. 61 (1935).

[7] People v. Ryan, 267 N.Y. 133, 195 N.E. 822 (1935); People v. Grant, 242 App. Div. 310, 275 N.Y. Supp. 74 (3d Dep't 1934), *aff'd mem.,* 267 N.Y. 508, 196 N.E. 553 (1935).

[8] 267 N.Y. 133, 195 N.E. 822 (1935).

[9] 242 App. Div. 310, 275 N.Y. Supp. 74 (3d Dep't 1934), *aff'd mem.,* 267 N.Y. 508, 196 N.E. 553 (1935).

[10] Laws of N.Y. 1933, c. 180 (later repealed by Laws of N.Y. 1934, c. 478, ALCO. BEV. CONTROL LAW).

[11] Laws of N.Y. 1933, c. 180, §§ 17(7), 89, as amended, Laws of N.Y. 1933, c. 819.

[12] *Id.* § 97(4).

to some of his rules the force of law and to deny it to others. It was the Board, in its discretion, and not the legislature that decided what acts were crimes. This was an unconstitutional attempt to delegate the law-making power to an administrative body.

But, of course, where the legislature makes a law, it may grant to administrative officers the power to formulate rules for its administration.[13] And where the legislature provides that violations of these rules will be a crime, this does not elevate the character of the delegated powers from an administrative to a legislative level.[14] What is forbidden is the conferment of the power to make law, which necessarily involves discretion as to what it shall be; what is permissible is the delegation of a discretion in the law's execution to be exercised under, and pursuant to, that law.[15]

Thus, if the rules promulgated by the Authority in the *Malmud* case were subject to the approval of the bondholders, they too would be deciding what actions are criminal. However, in upholding the delegation, the Court rejected the contention that "subject to the agreement of," was synonymous with "subject to the approval of," the bondholders. In other words, the bondholders were powerless in regard to penal sanctions. In this respect, the delegation of power in the instant case was valid. It conferred discretion on the Board to make the rules, but it was the legislature that made violations of these rules criminal.

The legislative function is performed, in its constitutional sense, therefore, when the legislature sets down the policy to be effectuated, identifies who may carry it out, and defines the scope of his authority.[16] The delegation of a certain discretionary power to fill in details upon which the operation of the statute depends is an ordinary and legitimate function of the legislature.[17] But such discretion must take the form of permissible administrative behavior within prescribed limits. Courts have insisted that there be no unbridled grant of discretion,[18] and have invalidated such grants as an abuse of the power to delegate.[19] Section 553(5) of the Public Authorities Law contains no express standard to canalize the discretion it confers. The Appel-

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[13] United States v. Grimaud, 220 U.S. 506 (1911).

[14] *Ibid.*; Union Bridge Co. v. United States, 204 U.S. 364 (1906); Darweger v. Staats, 267 N.Y. 290, 196 N.E. 61 (1935).

[15] See People v. Ryan, 267 N.Y. 133, 195 N.E. 822 (1935); Thomas v. Board of Standards & Appeals, 263 App. Div. 352, 359, 33 N.Y.S.2d 219, 226 (2d Dep't), *rev'd on other grounds*, 290 N.Y. 109, 48 N.E.2d 284 (1942); People v. Grant, 242 App. Div. 310, 275 N.Y. Supp. 74 (3d Dep't 1934).

[16] Bowles v. Willingham, 321 U.S. 503, 514-15 (1944); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941); Tropp v. Knickerbocker Village, Inc., 122 N.Y.S.2d 350 (Sup. Ct. 1955).

[17] *Ibid.*

[18] See, *e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[19] *Ibid.* See also Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 284 (1938).

late Division supplied the standard omitted by the legislature. They held that the "implied limitation of reasonableness" [20] was a sufficient restriction. This conflicts with precedent which insists that the legislature promulgate a standard in order to determine whether or not the Administrator is acting ultra vires.[21] This is a necessary corollary of the rule that courts may not invade the field of discretion conferred by law upon an administrative officer.[22] Nor may the courts usurp the legislative function of creating a standard.[23] Of course, necessity may demand that the legislature set standards in general terms,[24] but these must be capable of reasonable application or the grant is invalid.[25] Thus, the question is not merely are the rules reasonable; but simply are they part of a valid grant. The "implied limitation of reasonableness" does not meet such a test.

CONSTITUTIONAL LAW — CRIMINAL LAW — CONSTITUTIONAL PROVISION PERMITTING WAIVER OF JURY TRIAL IN FELONY CASES HELD SELF-EXECUTING. — Defendant, indicted for grand larceny,

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[20] People v. Malmud, 4 A.D.2d 681, 164 N.Y.S.2d 204 (2d Dep't 1957).

[21] See, *e.g.*, Hampton Co. v. United States, 276 U.S. 394 (1928); Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48 (1922); United States v. Grimaud, 220 U.S. 506 (1911); Field v. Clark, 143 U.S. 649 (1892); Noyes v. Erie & Wyoming Farmers Co-op., 170 Misc. 42, 10 N.Y.S.2d 114 (Sup. Ct.), *aff'd*, 281 N.Y. 187, 22 N.E.2d 334 (1939); New York Good Humor, Inc. v. Morgan, 171 Misc. 899, 14 N.Y.S.2d 7 (Sup. Ct. 1939).

[22] Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 284 (1938) (dictum). ". . . [T]o prevent its being a pure delegation of legislative power, [the legislature] must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. *It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show substantial compliance therewith to give validity to its action.*" Wichita R.R. v. Public Util. Comm'n, 260 U.S. 48, 58 (1922) (emphasis added).

[23] "We [the courts] do not read the limits on any powers." Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 284 (1938).

[24] See, *e.g.*, Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940) (authority to fix prices only when they have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of the act); Field v. Clark, note 21 *supra* (authority to suspend tariffs on administrative finding that the duties imposed by a foreign state are unequal and unreasonable); New York Cent. Securities Co. v. United States, 287 U.S. 12, 24-25 (1932) (the power to approve consolidations in the public interest); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (the power to regulate radio stations engaged in chain broadcasting as public interest, convenience, or necessity requires); Federal Trade Comm'n v. Keppel & Bro's, 291 U.S. 304 (1933) (the power to prohibit unfair methods of competition).

[25] Small v. Moss, 279 N.Y. 288, 299, 18 N.E.2d 281, 284 (1938) (dictum); Little v. Young, 274 App. Div. 1005, 85 N.Y.S.2d 41 (2d Dep't 1948) (per curiam); *cf.* Yakus v. United States, 321 U.S. 414 (1944); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941).