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Constitutional Law: Liability of Administrative Officers Acting Under Unconstitutional Statutes

Lester C. Lintz

CASE COMMENTS

CONSTITUTIONAL LAW: LIABILITY OF ADMINISTRATIVE OFFICERS ACTING UNDER UNCONSTITUTIONAL STATUTES

Smith v. Costello, 77 Idaho 205, 290 P.2d 742 (1955)

Two plaintiffs brought separate actions for damages against defendant for shooting their dogs. Defendant answered that he was an authorized conservation officer, that the dogs were running at large in territory inhabited by deer, and that he was authorized by statute[1] to shoot the dogs. The trial court held that defendant's plea constituted no defense because the statute was unconstitutional, and entered judgments for plaintiffs. On appeal, HELD, an administrative officer acting under the sanctions of a statute subsequently held unconstitutional is liable for injuries resulting from his acts. Judgments affirmed, two justices dissenting.

The problem of the principal case, the civil liability of an administrative officer for acts done under a statute that is subsequently declared unconstitutional, is one facet of a more basic problem: what effect, if any, should be given an unconstitutional statute? In the leading case of *Norton v. Shelby County*[2] Mr. Justice Field stated:[3] "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." This dictum crystallized the holdings in many earlier cases[4] and incepted the so-called absolute nullity doctrine that an unconstitutional statute is void from the date of attempted enactment. Today, courts can be divided into three general groups as regards the weight this doctrine carries when determining the effect of an unconstitutional statute.

[1]IDAHO CODE ANN. §36-1407 (1947): "[A]ny dog running at large in territory inhabited by deer, is hereby declared a public nuisance and may be killed at such time by any game conservation officer or other person entrusted with the enforcement of the game laws, without criminal or civil liability."

[2]118 U.S. 425 (1885).

[3]*Id.* at 442 (dictum).

[4]See *e.g., Ex parte* Siebold, 100 U.S. 371 (1879); Marbury v. Madison, 1 D.C. (1 Cranch) 137 (1803).

The majority group adhere to the nullity doctrine in disregarding an unconstitutional statute.[5] They impose liability upon an administrative officer on the ground that an unconstitutional statute, since it is void *ab initio,* can afford no protection to those acting thereunder.[6] Several courts in this group reinforce their holdings with the maxim *ignorantia juris non excusat.*[7] Thus, "every executive officer, or every person as for that matter, is presumed to know the law—a presumption often violent but always necessary."[8] In further support of this view it is contended that if ignorance of the law were a basis for excusing the officer it would be alleged in every case, and as a result "the administration of justice would be arrested, and society could not exist."[9]

A growing minority of courts refuse to apply the nullity doctrine, either by rejecting it entirely or by making important exceptions. These courts comprise the last two groups. Tennessee[10] and possibly Iowa[11] are the only jurisdictions to reject the nullity doctrine in its entirety. In Tennessee an unconstitutional statute is not void but voidable, and an administrative officer is not liable for acts committed under such a statute.[12]

In the third group the courts talk the nullity doctrine but make important exceptions.[13] This group finds its historical antecedent in *Chicot County Drainage Dist. v. Baxter State Bank.*[14] In that

[5]*E.g.,* Chicago, Ind. & L. Ry. v. Hackett, 228 U.S. 559 (1913); Propst v. Board of Educ., 103 F. Supp. 457 (D. Neb. 1951); Morgan v. Cook, 211 Ark. 755, 202 S.W.2d 355 (1947); State *ex rel.* Tharel v. County Comm'rs, 188 Okla. 184, 107 P.2d 542 (1940).

[6]*E.g.,* Norwood v. Goldsmith, 168 Ala. 224, 53 So. 84 (1910); Dennison Mfg. Co. v. Wright, 156 Ga. 789, 120 S.E. 120 (1923); Waud v. Crawford, 160 Iowa 432, 141 N.W. 1041 (1913); State *ex rel.* Evans v. Brotherhood of Friends, 41 Wash.2d 133, 247 P.2d 787 (1952).

[7]See Campbell v. Sherman, 35 Wis. 103 (1874); see also Norwood v. Goldsmith, 168 Ala. 224, 53 So. 84 (1910).

[8]Norwood v. Goldsmith, 168 Ala. 224, 234, 53 So. 84, 87 (1910).

[9]Campbell v. Sherman, 35 Wis. 103, 110 (1874).

[10]Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953).

[11]New York Life Ins. Co. v. Breen, 227 Iowa 738, 289 N.W. 16 (1939).

[12]Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953).

[13]*E.g.,* Cudahy Packing Co. v. Harrison, 18 F. Supp. 250 (N.D. Ill. 1937) (suit against collector for taxes collected under unconstitutional statute); Village of Dolton v. Harms, 327 Ill. App. 107, 63 N.E.2d 785 (1945) (suit against municipal treasurer misusing funds under sanction of unconstitutional statute); Golden v. Thompson, 194 Miss. 241, 11 So.2d 906 (1943) (suit against school principal for excluding children under unconstitutional statute).

[14]308 U.S. 371 (1940).

case the Court said that the broad statement of absolute nullity "must be taken with qualifications [because] . . . the actual existence of a statute . . . is an operative fact and may have consequences which cannot justly be ignored."[15] Some courts adopt this view as the more realistic approach to the problem.[16] Other minority courts argue that the majority rule is contrary to the recognized principle that every statute is presumed to be valid until judicially declared otherwise, that it works an injustice upon the officer, and that it is against "public policy."[17] These courts by refusing to invoke the nullity doctrine protect a public officer when he acts in good faith under the authority of an unconstitutional statute before it is judicially declared invalid.

In the principal case the court followed the majority view. In an earlier case,[18] however, the same court refused to apply the nullity doctrine to impose criminal responsibility on an officer who similarly had acted in good faith in reliance on the validity of an unconstitutional statute. Thus the Idaho court has adhered to the nullity doctrine to impose civil liability on a public officer but has been unwilling to extend the application of the doctrine to the field of criminal law.

The Florida Court has not as yet been confronted with the specific question of whether an administrative officer can be held civilly liable for acts done under a statute that is subsequently declared unconstitutional. It has, however, on many occasions been confronted with the underlying question of what effect, if any, should be given an unconstitutional statute. Its decisions have generally followed the nullity doctrine.[19] These cases indicate that the

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[15]*Id.* at 374. Plaintiff was collaterally attacking a decision of a federal district court, which had not been appealed, on the ground that the statute on which the decision was based had been subsequently declared unconstitutional. The question of constitutionality was not raised at the district court hearing, and plaintiff had been served but had not appeared. The *Chicot County* decision speaks in terms of res judicata as well as nullity — it is at least questionable whether the case in fact represents a limitation on the absolute nullity doctrine. See Jawish v. Morlet, 86 A.2d 96, 97 (D.C. Mun. App. 1952) (dictum).

[16]Warring v. Colpoys, 122 F.2d 642 (D.C. Cir.), *cert. denied,* 314 U.S. 678 (1941); J. S. Dougherty's Sons, Inc. v. Commissioner, 121 F.2d 700 (3d Cir. 1941).

[17]*E.g.,* Cudahy Packing Co. v. Harrison, 18 F. Supp. 250 (N.D. Ill. 1937); Bricker v. Sims, 195 Tenn. 361, 259 S.W.2d 661 (1953); Wichita County v. Robinson, 276 S.W.2d 509 (Tex. 1954); Shafford v. Brown, 49 Wash. 307, 95 Pac. 270 (1908).

[18]State v. Garden City, 74 Idaho 513, 265 P.2d 328 (1953).

[19]*E.g.,* McCormick v. Bounetheau, 139 Fla. 461, 190 So. 882 (1939); Weinberger

Court, if confronted with the question of the principal case, would probably follow the majority rule and impose liability on the public officer. If, however, the statute is defective as to form only, rather than substance, the Court might protect the officer by recognizing a *de facto* status.[20]

Under the majority holdings the officer is best protected by refusing to act and raising the question of unconstitutionality in a subsequent mandamus proceeding should one arise; if the statute is a nullity, he is permitted to protect himself from liability only by refusing to obey it.[21] This result is criticized because the officer will always hesitate before carrying out the commands of the legislative fiat.[22] Moreover, it forces an administrative officer to determine the constitutionality of a statute before acting, or to act at his peril.[23] As to this contention, one court suggests that, if the officer wishes to relieve himself of this burden, he can secure an indemnity bond.[24]

The minority view is the sounder because it obviates the burden of determining constitutionality that is placed upon an administrative officer by the majority rule — a determination the legislature originally made incorrectly and one which is frequently difficult even for trained lawyers and judges to make.[25] The minority rule, however, does nothing more than shift the burden of loss from the officer to the party injured by the officer's act. By preventing one injustice it creates another. Thus the majority and minority rules represent the two extremes of the pendulum's swing, and at either extreme someone who is hardly a wrongdoer is made to bear the burden. Of course, the courts cannot be expected to provide a panacea; it is beyond their power to do so. An extension of the declaratory judgment procedure might alleviate the problem to some extent. This could be accomplished by allowing administrative officers to question the validity of mandatory statutes which, if enforced by the officers and subsequently declared un-

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v. Board of Pub. Instr., 93 Fla. 387, 112 So. 253 (1927); State *ex rel.* Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924).

[20]See McCormick v. Bounetheau, 139 Fla. 461, 190 So. 882 (1939).

[21]Sumner v. Beeler, 50 Ind. 341 (1875).

[22]Allen v. Holbrook, 103 Utah 319, 135 P.2d 242 (1943).

[23]See Norwood v. Goldsmith, 168 Ala. 224, 53 So. 84 (1910); Campbell v. Sherman, 35 Wis. 103 (1874).

[24]Campbell v. Sherman, 35 Wis. 103 (1874).

[25]See Allen v. Holbrook, 103 Utah 319, 135 P.2d 242 (1943).

constitutional, would subject them to personal liability for any injuries caused by their enforcement. But even this might not be an efficient solution of the problem, since there would probably be a never-ending line of public officers seeking declaratory judgments.

The most logical step would be to force the pendulum to come to rest in the perpendicular and thereby shift the burden back to the general public through liability of its government. The state legislatures would do well to consider the advantages of adopting a system whereby the injured party would have recourse against the state.[26] It is obvious that the general public is more able to bear the burden than either the public officer or the party injured by the officer's act.

LESTER C. LINTZ

CRIMINAL LAW: RESPONSIBILITY OF FELON FOR DEATH OF CO-FELON

Commonwealth v. Thomas, 382 Pa. 630, 117 A.2d 204 (1955)

Defendant and an armed companion robbed a store and in effecting their escape ran in opposite directions. The robbery victim pursued defendant's companion and fatally shot him. Defendant was indicted for the first degree murder of his co-felon. The trial court sustained defendant's demurrer, and the commonwealth appealed. HELD, the justifiable killing of a felon's companion by the victim of the felony is sufficient to convict the felon of murder in the first degree. Judgment reversed, three justices dissenting.

At common law a killing committed by a person engaged in the commission of a felony was murder, and all felons participating in the felony were held criminally responsible for the death.[1] This was true even though the killing was unintentional or accidental, the essential element of malice being implied from the commission of the felony.

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[26] *Cf.* 28 U.S.C. §2671 (1952) (Federal Tort Claims Act).

[1] See 1 WARREN, HOMICIDE §74 (perm. ed. 1938); see also 40 C.J.S., *Homicide* §9 (1944).