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ADMINISTRATIVE TRIBUNALS—NOTICE AND HEARING—The State Highway Commissioner proceeded against the defendant railroad under a Virginia statute empowering him to order the removal of any railroad grade crossing and the substitution of an elevated road when in his opinion public safety and convenience demanded it. No notice and hearing was given or required, and the only judicial recourse was an action in equity in the event of "arbitrary" action. *Held*, by a six-three decision, that although it is assumed that a state legislature might order the same action, it by no means follows that an administrative officer may be empowered to act with finality without notice and hearing upon his own opinion and ordain the taking of private property, and to do so, as here, amounts to a delegation of purely arbitrary and unconstitutional power as to which the indefinite right of resort to a court of equity affords no adequate protection. *Southern Ry. v. Virginia*, (U. S. 1933) 54 Sup. Ct. 148.

The state court treated the function of the commissioner as legislative,¹ and it may be so designated without distorting the meaning of that term.² The conclusion reached on this premise was logically sound. The majority of the United States Supreme Court, assuming that the function is legislative, condemned its exercise without notice and hearing. A requirement of notice and hearing in an exercise of legislative power by an administrative tribunal is not an innovation in the law.³ There is merit in the suggestion that a difference

¹ *Southern Ry. v. Commonwealth of Va.*, 159 Va. 779, 167 S. E. 578 (1933).

² *Londoner v. Denver*, 210 U. S. 373, 28 Sup. Ct. 708 (1908); *Commonwealth v. Sisson*, 189 Mass. 247, 75 N. E. 619 (1905); *Munn v. Illinois*, 94 U. S. 113 (1876).

³ *State of Washington ex rel. Oregon R. R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535 (1911); *Chicago, M. & St. P. Ry. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462 (1890); *Chicago M. & St. P. Ry. v. Board of Com'rs*, 76 Mont. 305, 247 Pac. 162 (1926); *Union Lime Co. v. Railroad Comm. of Wis.*, 144 Wis. 523, 129 N. W. 605 (1911). See also, *Missouri Pac. R. R. v. Nebraska*,

in the composition and relation to the public between a legislature and an administrative tribunal demands the application of different procedural rules in certain instances.⁴ Since the exercise of legislative functions has long been permissible without the usual safeguards of judicial procedure, the question always prominent is: What delegated legislative functions require the conventional judicial procedure? The answer does not depend upon any one factor. The more general the order, the less possibility of a required confined procedure. It appears that where a special rule is evolved for a specific case and depends upon an investigation of facts by a commission, the function is in essence more judicial than legislative.⁵ And it appears that it will be so treated unless the public need for summary action far overshadows the individual's burden. Notice and hearing has even been denied or curtailed in the process of an admitted judicial function under this last exception.⁶ The majority and minority split at this point in the instant case, and it is impossible to assert dogmatically that either reached an erroneous conclusion. But since the same Court has previously upheld identical orders when promulgated by a city council without notice and hearing, is it altogether consistent to apply a different rule when the order is issued by a highway commission, which is less apt to be influenced by local prejudice? ⁷

J. H.

217 U. S. 196, 30 Sup. Ct. 461 (1910); *People ex rel. N. Y. & Queens Gas Co. v. McCall*, 245 U. S. 345, 38 Sup. Ct. 122 (1917).

⁴ See the principal case where *McReynolds, J.*, says: "There is an obvious difference between legislative determination and the finding of an administrative official not supported by evidence. In theory, at least, the legislature acts upon adequate knowledge after full consideration and through members who represent the entire public." *Southern Ry. v. Virginia*, (U. S. 1933) 54 Sup. Ct. 148 at 151.

⁵ *Curtis*, "Judicial Review of Commission," 34 HARV. L. REV. 862 at 878 (1921).

⁶ *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U. S. 441, 36 Sup. Ct. 141 (1915); *North Am. Cold Storage Co. v. Chicago*, 211 U. S. 306, 29 Sup. Ct. 101 (1908).

⁷ *Atlantic Coast Line R. R. v. Goldsboro*, 232 U. S. 548, 34 Sup. Ct. 364 (1914); *Chicago, M. & St. P. Ry. v. Minneapolis*, 232 U. S. 430, 34 Sup. Ct. 400 (1914); *Chicago, B. & Q. R. R. v. Nebraska*, 170 U. S. 57, 18 Sup. Ct. 513 (1898). See generally, *Erie R. R. v. Board of Public Utilities Com'rs*, 254 U. S. 394, 41 Sup. Ct. 169 (1921); *Lehigh Valley R. R. v. Board of Public Utilities Com'rs*, 278 U. S. 24, 49 Sup. Ct. 69 (1928).