1932

Case Note, *Welton v. Hamilton*

Ernst Freund

(1) In the first place, it could be solved by holding that the elementary facts of attestation required by the substantive law did not exist, i. e., the will was not attested by *two* witnesses. Cherry was a known living person. But "J. M. Gordon" was a mere signature, and the stranger in the office was an unknown personality. Whether that was his real name, was not known. A fictitious person cannot be an attester. One object of the Wills Act, in requiring the presence of witnesses, is to provide testimony by responsible persons; and the reason the law allows proof of a deceased witness' signature to suffice is "the presumption that what an honest man hath attested under his hand is true."[6] The attester must at least be a known person, not merely an anonymous physical being.

On this theory, even assuming the truth of Cherry's testimony, the will was not validly executed, because there was only one valid attesting witness.

(2) But, on another theory, and assuming that the second attester was a sufficient one, nevertheless it remained to prove his signature. The settled law is that, when an attester is deceased or cannot be found, his signature may and must be proved. But in this case nobody knew "J. M. Gordon"; nobody could identify the handwriting as that of a person calling himself J. M. Gordon or as that of anybody else. Either the name was fictitious (not the name of the person signing), in which case the attestation was void (on theory (1) above); or the name was the signer's real name, in which case the proof of his handwriting was lacking, and the rule requiring such proof was not satisfied.

We are disposed to rest upon the former hypothesis. The latter one is open to the objection that Cherry's testimony to seeing the stranger sign in his presence is sufficient proof of his handwriting.

However, on one or the other of these theories the case could have been disposed of, in rejecting the purporting will. The proposition relied upon in the opinion, viz., that two witnesses must "prove" the will, was not needed to support the decision.

JOHN H. WIGMORE.

ZONING—POWER OF BOARD TO VARY.—[Illinois] The practical effect of the decision in *Welton* v. *Hamilton*[1] is apt to be misunderstood, if read without reference to the legislative background at the time of the decision and as subsequently changed. The zoning law of Illinois (1921/3) provides for a board of appeals with power to determine and vary the application of zoning regulations in harmony with their general purpose and intent and in accordance with general or specific rules contained in the regulations.

6. Kirkpatrick, C. J., in *Newbold* v. *Lamb* (1819) 2 Southard (N. J.) 449.

1. (1931) 344 Ill. 82, 176 N. E. 333.

"Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the ordinance the board of appeals shall have the power in passing upon appeals to vary or modify the application of any of the regulations or provisions of such ordinance relating to the use, construction or alteration of buildings or structures or the use of land, so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done."

This power of variation, which is a familiar feature of zoning legislation, the court holds to be an invalid delegation of power because it provides no rule or standard for the guidance of the board other than its own uncontrolled discretion.

Upon the merits of the position taken by the Supreme Court as a matter of constitutional law it is unnecessary to enlarge; the writer of this note has expressed his views in a note in the *National Municipal Review* of September 1931. While the case is disposed of entirely on grounds of constitutional invalidity, the court, in the course of the opinion makes the following significant statement:

"In this particular case the board of appeals did not make any attempt to state what the difficulty or hardship was in the way of carrying out the strict letter of the ordinance or in what respect the spirit of the zoning ordinance might be observed, the public safety or welfare secured and substantial justice done by the erection of the proposed building. The board simply made the general finding that there is unnecessary hardship, etc., and ordered the issue of the permit, and the only thing decided is that the board of appeals thought a permit ought to issue in this case in accordance with the plans submitted and in violation of the express provisions of the ordinance but with no indication of the reasons why."

It appears from this, that by the application of general principles of administrative law, the court should have been able to reverse the decision of the board of appeals upon the board's own record or lack of record, applying the general rule that when a board has power to make a determination, upon a hearing, there must be record evidence sufficient to substantiate the decision reached. Plainly the decision of the board could not stand this test. This more conservative method of dealing with the case would also have made the discretion of the board appear as one judicially controllable as to its exercise; and the delegation of such a discretion, being a valuable and indispensable adjunct to the necessarily complex provisions of modern regulative legislation, should not lightly be held to be invalid.

What is the effect of the decision? The varying power of the board of appeals is gone, but the power of the city council to amend the zoning ordinance must remain, since it is indispensable. An amendment by the council may be as arbitrary as a variation by the board of appeals. A court of equity can grant relief against an arbitrary amendment; and it does so, not by declaring the power

unconstitutional, but by declaring its exercise illegal,[2] precisely what the court should have done in the present case.

Even subject to a judicial check on general equitable principles, the power of amendment vested in the council is in its intrinsic guaranties of conservative and fair exercise hardly superior, if indeed it is equal, to an administrative power of variation. Or rather, the amending power is equally capable of abuse, if there are no better safeguards than those hitherto found in the amending process. Legislation, even if controlled by a judicial veto power, can hardly rival in effectiveness a semi-judicial administrative procedure. The question, then, remains whether the benefits of such a procedure cannot be saved even under the decision in *Welton* v. *Hamilton.*

The zoning ordinance in force when *Welton* v. *Hamilton* was decided dealt very briefly with the subjects of the board of appeals and of amendments, prescribing no safeguards for the board procedure, and only the most meagre safeguards for the amending process. The original zoning ordinance of April 5, 1923, had been very different in this respect. Section 29, entitled "Functions of the Board of Appeals," had prescribed for variations a recommendation by the board based upon a hearing, and carried into effect by an amending ordinance, and had specified seventeen different grounds for variation. It does not appear why this conservative procedure was subsequently discarded. What is of importance, is that in view of the new situation, the City Council has reinstated the provisions of the former ordinance in substantially the original form. (See Council Proceedings of July 20, 1931.) The decision in *Welton* v. *Hamilton* will thus at least have the beneficial effect that a less satisfactory will be replaced by a more satisfactory procedure. The delegation declared unconstitutional disappears; the varying power vested in the council is not only not a further delegation of power, but it is also not a power left without guiding standards; the constitutional objections that were found fatal in *Welton* v. *Hamilton* appear to have no application to the reenactment of the original ordinance.

It is true that the safeguards that have been reinstated are based upon ordinance only, and not on statutory requirement; but the Supreme Court of Illinois has recently held that the city council is bound by its own requirements, and that an ordinance passed in contravention of such requirements is invalid.[3] Taking it altogether, the law is now in a more satisfactory condition than it was before the decision in *Welton* v. *Hamilton.*

ERNST FREUND.

2. *Phipps* v. *Chicago* (1930) 339 Ill. 315, 171 N. E. 289.
3. *Cain* v. *Lyddon* (1931) 343 Ill. 217, 175 N. E. 391.