

\$150,000 which Weisant was required to get. But that does not prove that he would not have written the required amount had he been left alone. The confusion resulting from the establishment of two agencies in the same city, apparently in competition with each other, may have been the cause of the loss of much business by Weisant, not to mention his loss of time in trying to have matters straightened out.

It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it. Williston on Contracts, vol. 2, sec. 677. Mr. Williston has made an exception to this principle where the hindrance is due to some action of the promisor, which, under the terms of the contract or the customs of the business, he was permitted to take. It could well be found that this exception does not apply to the present case, because the acts of hindrance, in themselves, indicated bad faith on the part of the insurance company and a breach of the fiduciary relation, and by depriving Weisant of the benefits under his contract, such acts amounted to a breach of contract. *Meyers v. Knickerbocker Ins. Co.*, ante.

By hindering Weisant in performing the condition precedent, the insurance company waived such condition. As a result, there was no valid reason for Weisant's discharge on January 16, 1931. Interpreted in this light, the discharge being wrongful, Weisant became entitled to damages for breach of the contract, and these should have been set off against the insurance company's counterclaim.

E. R. TEPLE

THE POWER OF MUNICIPALITIES TO PURCHASE PROPERTY BY THE PLEDGE OF RECEIPTS PLAN

Plaintiff in error, a village owning a distributing system for electric current, contracted with another to supply generating machinery for its system for the sum of \$24,960 payable partly in cash and partly in deferred installments from the net revenues derived from the plant's operation. The title to the machinery was to remain in the seller until paid for, but the purchase price installments were not to be the general obligation of the village or payable from taxes. One Hill, a taxpayer, resident of the village, brings this action to restrain the village from carrying out the terms of the contract, contending that the transaction is prohibited by Section 6, Article VIII of the Constitution of Ohio. *Held*—"The foregoing transaction between the village and the seller of the machinery contemplates the union of the property of the village with that of the seller in a common enterprise, from which the net earnings of the joint operation would be paid to the seller. To the extent that the village devoted the whole of its own property to secure the seller, to that extent did it loan its financial credit to, and in aid of the seller, in violation of Section 6, Article VIII of the Constitution of Ohio." *Village of Brewster v. Hill*, 128 Ohio St. 343, 7 Ohio Bar No. 12, June 18, 1934. (Decided, April 11, 1934).

The constitutional provision referred to provides,—“No laws shall be passed authorizing any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation,

or association whatever; or to raise monel for, or to loan its credit to, or in aid of any such company, corporation, or association."

The common definition of credit is "that confidence in the ability and intention of a purchaser or borrower to make payment at some future time,"—Pope's Legal Definitions, A-I, Vol. 1, and similarly, "trust given or received, expectation of future payment for property transferred or of fulfillment of promises given."—Webster's International Dictionary

Since the transaction in dispute involves the sale of property for a consideration, part of which is to be paid in the future, the village is the recipient of the credit that has been loaned by the seller.

The Supreme Court of Ohio in support of its opinion cited the following cases: *Taylor v. Commissioners of Ross County*, 23 Ohio St., 22, 35 L. R. A., 737, (1872), *Alter v. City of Cincinnati*, 56 Ohio St., 47, 46 N.E., 69, (1897), *Markley v Village of Mineral City*, 58 Ohio St., 430, 51 N.E. 28, (1896), *Campbell v. Cincinnati Street Ry. Co.*, 97 Ohio St., 283, 119 N.E., 735, (1918), and *Cincinnati v Harth*, 101 Ohio St., 344, 128 N.E., 263, 13 A.L.R., 308, (1920). There is no argument as to the correctness of the principles of law, as applied to the facts present in each case. A review of these cases, however, shows that each of them, by its facts, can be clearly distinguished from the principal case.

Taylor v. Commissioners of Ross County (supra) involved the constitutionality of a legislative enactment purporting to authorize subdivisions of the state to enter upon the construction of railroad lines. It followed of necessity, therefore, that where funds allotted for that purpose were insufficient, the construction would have to be completed by private individuals or companies, who then would own or have beneficial control of the railroad when completed. It is hardly debatable that the statute there in question was unconstitutional, because it indirectly permitted subdivisions of the state to extend their aid or credit by expressly authorizing them to undertake certain construction work, the benefit of which might later accrue to private persons. That case, however, involved no contemplated sale of property by a private concern to a village or other subdivision of the state, as in the Brewster Case, and for that reason should not stand as authority for any conclusion which may be reached under the facts of the Brewster Case.

The case of *Alter v. City of Cincinnati* (supra) also involved a statutory enactment, whereby municipalities were authorized to contract for the addition to, or extension of waterworks systems, on such a basis that the city owning a part, and the contractor owning a part, the system would become a common enterprise. Since this enterprise would be in the nature of a partnership, each party would be liable for the debts of the partnership, and thus each party would extend its credit to the other to the extent that it contemplated the paying by one party of any of the other party's share of the partnership debts. The transaction authorized in the Alter Case as distinguished from the principal case, contemplated a permanent enterprise in which the property of the city was to be permanently united in a partnership with the property of the other party. Furthermore, no conditional sale was there involved, and the city was never to have complete legal title to the whole property

In *Markley v. Village of Mineral City* (supra) the village purchased

certain real estate out of its funds with the intention of conveying the property to a certain manufacturing company as an inducement to build and operate its plant within the municipality. There it was correctly held that the conveyance of the property to the manufacturing company was unconstitutional as a violation of Section 6, Article VIII. The fallacy of setting that case up as an authority for the conclusion of the Brewster Case, rests in this distinction,—in the Mineral City Case the property was to be conveyed with no return of consideration, and the private company was to receive the benefit of municipal funds gratis, while in the principal case, the city in purchasing the property contracted for a reasonable consideration therefor. Not only is there this distinction, but the facts are also different, in that in the one case the village was conveying property while in the other it was purchasing property.

Campbell v. Cincinnati Street Ry. Co. (supra) involved the constitutionality of an ordinance of the City of Cincinnati, providing for a grant to the street railway company of the right to operate jointly a street railway owned by the city with a system already owned by the company. The ordinance also provided that the gross proceeds of the operation of the joint enterprise should be used for the payment of existing and hereafter issued securities of the company. The securities already existing were the individual liability of the street railway company, and since the property of the city was to be used in earning money to pay off these liabilities, the result would follow that the city was lending its aid to the company in an unconstitutional manner. But the similarity between that case and the principal case ends with the union of the distributing system with the generating equipment, for the proceeds in the Brewster Case were not to be used in extending credit to the seller, but merely to acquire legal title.

The last case cited by the court as sustaining its opinion was *City of Cincinnati v. Harth* (supra) which case involved Sections 3812-2, 3813-3 of the General Code of Ohio. The court held that insofar as such provisions purported to authorize a municipality to replace, renew, repair or reconstruct the rails, ties, roadbed or tracks of a street railway company with public money raised by the sale of bonds of the municipality, these provisions were unconstitutional. Here again, the facts show a contemplation of extending aid to a street railway company through the performance of services gratis. There was to be no purchase of property for the use of the city as in the Brewster Case, and hence the one case can hardly stand in support of the other.

Since the cases cited are not analogous, the Supreme Court might well have followed the policy which it established in *Cincinnati v. Dexter*, 55 Ohio St., 93, 44 N. E., 520, (1896) and *Newark v. Fromholtz*, 102 Ohio St., 81, 130 N. E., 561, (1921) in both of which cases, a conclusion might easily have been reached that the transactions involved were unconstitutional, as contemplating the extension of credit. The court saw fit in those instances, however, to construe Section 6, Article VIII liberally so that the transactions not being objectionable in any way, were by reason of policy held to be legal.

In *Cincinnati v. Dexter* (supra) it was held that the Act of March 12, 1887, (84 O. L. 82) which authorized municipalities to construct and sell railways was not in conflict with Section 6, Article VIII. It was further held

that no sale as authorized by that Act would become unconstitutional by reason of the fact that the purchase price of the property was to be paid by the purchaser from future gross earnings of the road.

Newark v. Fromholtz (supra) involved these facts; an electric railway company being liable under the terms of its franchise for the cost of repaving that part of a street occupied by it, made arrangements with the city for the city to repave that part of the street, whereupon the company became responsible for reimbursing the city for the sub expended in its behalf. The transaction was held not to constitute the extension of credit, so as to be prohibited by Section 6, Article VIII.

It is submitted, that having in mind the facts of the principal case and of the cases of *Cincinnati v Dexter* (supra) and *Newark v. Fromholtz* (supra), and applying the above stated definition of credit, there is actually more of an extension of credit in these latter cases than can be found in the principal case.

Section 4, Article XVIII of the Constitution of Ohio bestows on municipalities "the right to acquire, construct, own, lease and operate, within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service."

Section 12, Article XVIII provides that "any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability on such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which in case of foreclosure, the purchaser may operate the same, which shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure."

In adopting these provisions as a part of the Constitution, the people of Ohio made clear their intention to bestow sweeping authority on the municipalities in so far as public utility services are concerned. That the decision of the Supreme Court in the principal case abridges the power of municipalities to carry out the intention of the people may be demonstrated by a comparison of the "pledge of receipts condition sale" plan with the "mortgage bond" method of purchasing equipment for the extension of utility services. Under the "mortgage bond" method, the Constitution expressly provides: "such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall be secured only upon the property and revenues of such utility." The effect of this constitutional provision is to grant municipalities the authority to issue bonds on the whole utility system and not a mere part thereof. The Constitution goes even further and states the exact course to be pursued in case the village were to default on the bonds: the property secured by the bonds shall include "a franchise stating the terms upon which in case of foreclosure the purchaser may operate the same." "The conditional sale pledge of receipts" plan amounts to little more than a lease of the property by the seller to the pur-

chaser until the amounts paid total the stipulated purchase price. There is no danger of the village losing its title and right to operate the whole system because of foreclosure as there is under the "mortgage bond" method of financing the transaction. True, the receipts on the operation of the entire system are pledged under that particular plan for the payments to be made before acquiring legal title, but were the village to fail in making sufficient payments to acquire legal title, it would still retain that part of the system originally owned by it.

Besides these distinctions between the two methods there is another. The "conditional sale" plan is simple in operation and effect, while the "mortgage bond" method is cumbersome and its effect may be more disastrous on the municipality's rights in the system. A "conditional sale" involves only the making of a contract, the recording of same, the payment of installments when due, title automatically passing to the purchaser when the last payment is made. To finance by means of "mortgage bonds," it is necessary that a suitable market be found for them, that payments on the bonds be made to divers persons if the seller is indisposed to purchase the bonds or take them as security for payment. There is a possibility that under such a method the village may have to deal with many parties, while the entire transaction under the "conditional sale" plan involves only purchaser and seller. Surely it was not the intention of the people to give municipalities the authority to finance purchases by issuance of "mortgage bonds" and deprive them of the power of purchasing the equipment by a much more desirable method, the "conditional sale" method. That such was their intention becomes even more improbable upon the realization that the sole objection to the "conditional sale pledge of receipts" plan is based upon a conclusion arrived at by technical reasoning, that a transaction under that plan would constitute a lending of credit by the municipality. Add to this, the fact that under the "mortgage bond" method there is an extension of credit to a much greater degree than possible under the "pledge of receipts" plan, and one is led to the conclusion that the broad powers granted to municipalities in regard to utility services includes the authority to purchase equipment under the plan involved in the principal case.

JAMES R. TRITSCHLER

USE OF THE INJUNCTION TO PROTECT RIGHTS OF PERSONALITY*

The recent case of *Tate v. Eidelman* 32 O. N. P (N.S.) 478 (decided in Common Pleas Court of Mahoning County September 21, 1934), in which Plaintiff sought to restrain an infringement of his civil rights, presents again the question of whether or not the court of equity has the power to protect rights of personality by an injunction—an oft-recurring problem that the courts have not adequately solved. Plaintiff sought an injunction restraining the defendant restaurateur from refusing, solely on account of race and color, to serve him and other citizens. Although the court intimated that it was dissatisfied and would favor the extension of the use of the injunction,

* Published in *Ohio Bar*, Dec. 8, 1934.