Case Western Reserve Law Review

Volume 11 | Issue 3

1960

Municipal Corporations

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MUNICIPAL CORPORATIONS

Victory for Constitutional Home Rule

Since the adoption by the electorate in 1912 of article XVIII of the Ohio Constitution, the purpose of which in the minds of its framers was to emancipate municipal corporations from legislative bondage,[1] home rule has had an uncertain and uneven road at the hands of the Ohio courts. In the past few years, however, there have been heartening improvements in the patient's condition. A significant rally took place in *State ex rel. Leach v. Redick*.[2] In this case the supreme court held that the City of Columbus was not bound to follow the provisions of sections 721.01 and 721.03 of the Ohio Revised Code with respect to the procedures required in the lease or sale of municipally owned real estate.

The big leap forward resulted from the holding that the *procedure* outlined by the legislature is an unconstitutional invasion of the powers of local self-government conferred on municipal corporations by article XVIII, section 3. An earlier case[3] seems to have established that the power of sale itself was one of the powers of local self-government, thus knocking out section 721.01. But it was not a clear-cut holding that in *exercising the power,* a municipality was not bound to follow the procedure set out in section 721.03. In *Hugger v. City of Ironton*[4] the court of appeals had held this attempt to prescribe procedure to be without justification, but, unfortunately, the appeal from that decision was dismissed.[5] Thus was lost an opportunity to decide with finality a question of importance to municipal attorneys and to title companies, as well as to the student of municipal law. In the *Redick* case the supreme court adopted the wording of the court of appeals in the *Hugger* case.

Police and Fire Pensions

A subject closely related to the field of municipal corporations is that of municipal police and firemen's relief and pension funds. All municipalities with two or more "full time regular members" in such respective departments are required to maintain such funds,[6] and it has been held by the supreme court that the state statutes prevail over municipal charter provisions in this respect.[7] Even if this ruling

1. Ellis, Ohio Municipal Code, Text § 1.1 (10th ed. 1955).
2. 168 Ohio St. 543, 157 N.E.2d 106 (1959).
3. Babin v. City of Ashland, 160 Ohio St. 328, 116 N.E.2d 580 (1953).
4. 83 Ohio App. 21, 82 N.E.2d 118 (1947).
5. 148 Ohio St. 670, 76 N.E.2d 397 (1947).
6. Ohio Rev. Code ch. 741.
7. Cincinnati v. Gamble, 138 Ohio St. 220, 34 N.E.2d 226 (1941). There is a question whether the holding in this case has not been considerably weakened by State *ex rel.* Lynch v. City of Cleveland, 164 Ohio St. 437, 132 N.E.2d 118 (1956), and further destroyed by State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

should in the future be reversed, the case of *State ex rel. Bailey v. Board of Trustees of Toledo Police Relief and Pension Fund*[8] provides a guide to the solution of a problem with respect to the management of such funds.

A member of the city police force resigned in 1942, after almost eighteen years of actual service, to enter the armed services. He was entitled to, applied for, and received a pension during the time he was in military service.[9] When he received his honorable discharge from military service, he applied for, and was reappointed to the police department[10] and served until 1957, when he again retired with a total of over thirty-two years of service.

The questions were (1) whether the patrolman could claim credit toward his new retirement pension for the period while he was previously on pension during military service, and (2) if he could, whether he must return to the fund the total drawn by him during that time. The supreme court held that in computing his total service for his new pension, relator was entitled to count the time during which he was in military service and drawing his first pension, but that he must repay to the fund the amount which he had received by way of pension during military service. Despite relator's contention that Ohio Revised Code section 741.47[11] allowed him to keep the moneys he had previously received, the court analogized the situation to that of a member of the department who, having resigned, withdrew from the pension fund his accumulated contributions, entered military service, and was thereafter reinstated in the department. Under the provisions of Ohio Revised Code section 741.49, such a person would be required to restore to the fund the amounts received from it by him. The court felt that to rule otherwise with respect to relator would be to give him an unjustly favorable position.

Tort Liability

There were several decisions in the area of municipal tort liability during the period covered by this Survey. In *Crisafi v. City of Cleveland*,[12] recovery was sought against the municipality for injuries to property alleged to have been caused by subterranean tremors resulting from dynamiting and blasting in a nearby municipal park and zoo. Plaintiff contended that liability was imposed by Ohio Revised Code section 723.01, enjoining upon municipal corporations the duty of

8. 169 Ohio St. 1, 157 N.E.2d 317 (1959). See also discussion in *Administrative Law and Procedure* section, p. 338 *supra.*

9. Ohio Rev. Code § 741.49(E) (Supp. 1959).

10. Ohio Rev. Code §§ 143.22, 741.48 (Supp. 1959).

11. "Sums of money due or to become due to any pensioner shall not be liable to attachment, levy, or seizure under any legal or equitable process . . . but shall inure wholly to the benefit of such pensioner."

12. 169 Ohio St. 137, 158 N.E.2d 379 (1959).

keeping their public grounds free from nuisance, and he relied upon certain cases holding that the use of dynamite is an absolute nuisance,[13] making a city liable for its use.[14]

The supreme court, as a matter of law, found there was no municipal liability. The court stated that a city is liable for damage resulting from the creation of a nuisance where the city is acting in a proprietary capacity. But the court held that no such liability will attach, in the absence of statute, where the municipality is engaged in the performance of an act in its governmental capacity, in which capacity the court classified the improvement of a park and zoo. Section 723.01 was held to impose the duty upon municipalities only with respect to keeping such grounds free from nuisance as to persons *traveling therein* or *using* the same, which plaintiff was not doing here. Further, the damage to plaintiff's property was held not to constitute a *pro tanto* appropriation.[15]

In *Eversole v. City of Columbus*,[16] the city was held not to be immune from liability to a plaintiff who enrolled as a student in an arts and crafts course, organized as a part of the city's recreational program. Plaintiff paid a fee of $1.50, entered a "closet" in the building at the direction of the school director, and fell down an unlighted and unguarded stairway. Conceding that ". . . the attempt to distinguish between governmental and ministerial or proprietary functions in determining the liability of a municipal corporation is artificial and unrealistic, and that [there is sentiment that] such distinction should be abolished,"[17] the court reviewed various attempts to distinguish where and how the line should be drawn, acknowledged that "it is impossible to reconcile all the decisions of this court dealing with the subject of governmental and proprietary functions" (citing numerous examples), and ruled that in this case the city, "in voluntarily establishing and maintaining an arts and crafts center primarily for the benefit and accommodation of those of its inhabitants who might be interested was not exercising the functions of sovereignty and was engaged in a proprietary venture which made it amenable to tort liability."[18]

Zoning Matters

Within the broad framework of the constitutionality, in general, of zoning regulations, there still remain many questions in specific

13. Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co., 60 Ohio St. 144, 54 N.E. 528 (1899).

14. Louden v. Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914).

15. For a more complete discussion of the *Crisafi* case, see 11 West. Res. L. Rev. 319 (1960).

16. 169 Ohio St. 205, 158 N.E.2d 515 (1959).

17. *Id.* at 207, 158 N.E.2d at 517.

18. *Id.* at 208, 158 N.E.2d at 518.

instances. The infinite variety of phraseology which is to be found in comparing the ordinances of one city to those of another, and the fact that every parcel of land on the face of the earth is unique and is entitled to be considered as such in the face of general efforts to control its use, make it difficult to lay down broad rules for determining the validity of zoning ordinances.

During the period covered by this Survey, there appeared a decision which seems for the first time, in Ohio, to have upheld the prohibition of the use of land zoned for residential purposes as a means of access to a lawfully operating use of a lower zoning classification.[19] Noting that ingress and egress were available to a shopping center over land zoned for commercial use, the court distinguished an earlier case[20] in which there was an absolute absence of any access to the street, and enjoined the use of a lot in a residential area for egress and ingress to a shopping center.

In *Freight, Inc. v. Board of Township Trustees,*[21] the Court of Appeals for Summit County had before it the question of whether an Ohio corporation engaged in the intrastate and interstate transportation, by motor vehicle, of chattels, general commodities, and other property, with the necessary authority of the ICC and of the public utilities commissions of Ohio and other states, was a public utility within the scope of Ohio Revised Code section 519.21. The statutory authority for zoning in townships (as distinguished from municipal corporations) is limited, and this particular section forbids township zoning regulations to restrict or regulate the location, erection, construction, or use of land owned or used by any public utility or railroad.

The court held the plaintiff to be a public utility, and, therefore, exempt from zoning regulation. The result, inescapable under the statute, points out one advantage of incorporation over the township form of government, and the possibility of the need for a change in the township zoning statutes.

Police Power

A most significant decision in the area of the exercise of municipal police power was made in the case of *State ex rel. Cleveland Electric Illuminating Company v. City of Euclid.*[22] On the one hand, it is a strengthening of the power of municipal corporations to regulate the erection and construction of public utility electric transmission lines. On the other hand, the result will probably be to increase considerably the cost of electric current to consumers thereof.

The City of Euclid adopted an ordinance requiring electric power

19. Windsor v. Lane Dev. Co., 158 N.E.2d 391 (Ohio Ct. App. 1958).
20. Northern Boiler Co. v. David, 157 Ohio St. 564, 106 N.E.2d 620 (1952).
21. 158 N.E.2d 537 (Ohio Ct. App. 1958), *motion to certify denied,* Dec. 10, 1958.
22. 169 Ohio St. 476, 159 N.E.2d 756 (1959).

companies to place underground their wires carrying in excess of 33,000 volts. The relator-utility company, doing business in the city under a franchise dating back to 1906, contended that the requirement of the ordinance was unreasonable, unrelated to the health, safety, and welfare of the inhabitants of the municipality, and, therefore, unconstitutional. A special master appointed by the Cuyahoga County Court of Appeals, in which court the original mandamus action to compel the issuance of a construction permit had been brought, found the ordinance unconstitutional and the court of appeals adopted his recommendation.[23]

By a 4 to 3 vote, the supreme court reversed the court of appeals and upheld the city's contentions. The supreme court relied upon three separate sections of the Ohio Revised Code,[24] which authorize "reasonable regulation" of such facilities by the city and require the consent of the municipal council for their erection. The court took judicial notice of the inherently dangerous character of high-voltage electricity and pointed out that even with the modern safety devices which attempt to protect against accidental harm from such installations, there exist "dangerous propensities."

A motion for rehearing of the case was subsequently overruled.[25]

A "Green River" peddler's and hawker's licensing ordinance of the City of Defiance was before the Court of Appeals for Defiance County in *City of Defiance v. Nagle*.[26] The gist of such ordinances is a provision thereof which declares the "practice" of going in and upon private residences by solicitors, peddlers, hawkers, and itinerant vendors of merchandise, not having been invited to do so by the owner or occupant, to solicit orders for, or to peddle goods, wares, and merchandise, to be a nuisance punishable as a misdemeanor.

The defendant in this case, a route man for a bakery which sold much of its products from its wagons by door-to-door solicitation of regular customers, had the misfortune of attempting to secure the patronage of the wife of the chief of police. That law-abiding lady promptly did him in.

The court of appeals reversed a conviction under the ordinance. They did so on the specific ground that the forbidden "practice" was not shown by the commission of a single act of solicitation. In dictum they adverted to the provision of Ohio Revised Code section 715.63, which provides in part that "no municipal corporation may require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, a license to vend or sell, by him-

23. State *ex rel.* Cleveland Elec. Illuminating Co. v. City of Euclid, No. 24263, Ohio Ct. App., Nov. 19, 1958.

24. OHIO REV. CODE §§ 715.27, 4933.13, 4933.16.

25. State *ex rel* Cleveland Elec. Illuminating Co. v. City of Euclid, 170 Ohio St. 45, 162 N.E.2d 125 (1959). See also discussion in *Constitutional Law* section, p. 359 *supra.*

26. 108 Ohio App. 119, 159 N.E.2d 791 (1959).

self or his agent, any such article or product." Since defendant was discharged on the ground previously mentioned, this argument need not have been mentioned at all, as one judge pointed out in a separate opinion[27] in which he raised the very pertinent question of whether section 715.63 is not itself in conflict with article XVIII, section 3 of the state constitution. No mention was made of the earlier case of *Frecker v. City of Dayton*.[28] In that case, the court struck down the attempt of the City of Dayton, by ordinance, to prevent the sale in parks and on streets and sidewalks of such items as ice cream, candy, and soft drinks. The court reasoned that Ohio General Code section 3670 (now Ohio Revised Code section 715.61) authorized cities to regulate, which thereby excluded the power to forbid. The *Frecker* case probably ought to be re-examined in the light of the decision in the *Nagle* case, when the opportunity to do so is afforded.

Home Rule — Power to Create Offenses

The City of Cleveland had an ordinance defining and providing the punishment for the offense of carrying concealed weapons. It was substantially like the state statute.[29] The principal difference between the two was that the city ordinance provided for punishment upon conviction by a fine of not less than $200 nor more than $500, and imprisonment of not less than three months nor more than six months. The statute permits treatment of the offense as either a felony or a misdemeanor, by providing for a penalty of not more than $500 fine, or imprisonment in the workhouse for not less than thirty days nor more than six months, *or* imprisonment in the penitentiary for not less than one year nor more than three years.

Defendant was charged, convicted, and sentenced under the city ordinance and appealed.[30] The city relied upon section 3, article XVIII of the Ohio Constitution.[31]

Defendant relied upon section 10, article I of the Ohio Constitution[32] and Ohio Revised Code section 1.06.[33]

The supreme court held that since penitentiary imprisonment *may be* imposed for violation of the statute, the offense is a felony, and

27. *Id.* at 123, 159 N.E.2d at 794 (separate opinion).

28. 88 Ohio App. 52, 85 N.E.2d 419 (1949), *aff'd,* 153 Ohio St. 14, 90 N.E.2d 851 (1950).

29. Ohio Rev. Code § 2923.01.

30. City of Cleveland v. Betts, 168 Ohio St. 386, 154 N.E.2d 917 (1958). See also discussion in *Criminal Law* section, p. 368 *supra.*

31. "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

32. "Except in cases . . . involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury. . . ."

33. "Offenses which may be punished by death or imprisonment in the penitentiary are felonies; all other offenses are misdemeanors . . . ."