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Municipal Corporations

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coerce, so that the proceeding was one of criminal contempt. One who defies public authority, be that one an unincorporated association of laboring men, an individual, or a corporation, and who willfully disobeys a court order, the court said, must pay the penalty. The very purpose of a writ of replevin, the court held, is to effect a delivery of the property to the plaintiff and requires the sheriff to take actual physical possession thereof. The nature of the duty of the court's officer, it was further said, is not to be determined by the parties to the writ, much less by third parties such as the defendants. The nature of the charge, the court explained, was not one for disobedience of a court order but for resistance to and interference with the execution of process.[17]

The case also seems to have aspects of mass picketing which the state courts have jurisdiction to enjoin if the peace appears to be threatened.

EDWIN R. TEPLE

LANDLORD AND TENANT

Because of the lack of significant opinions rendered on Landlord and Tenant during the period covered by this survey, Mr. Marshall I. Nurenberg has not submitted an article this year.

THE EDITORS

MUNICIPAL CORPORATIONS*

The recent cases involving municipal corporations have arisen in various areas including: the definition of a "conflict" between a state statute and a municipal ordinance; the determination of an applicant's rights in zoning; and, the situations of municipal tort liability. The litigation which will be discussed can be classified into that which involves the state and the municipal corporation and that which involves the individual and the municipal corporation.

STATE V. MUNICIPAL CORPORATION

When is a Municipal Ordinance in Conflict With a State Statute?

Municipalities in Ohio are authorized to adopt local police, sanitary, and other regulations by virtue of Constitutional Home Rule and are subject to no limitations except that such ordinances must not conflict with

17. Judge Bell dissented on the ground that the facts in the record gave rise to a reasonable doubt as to the presence of the intent necessary to prove a criminal contempt.

general laws.[1] The test for determining a "conflict" was established by the Ohio Supreme Court in *Village of Struthers v. Sokol*:[2]

> [T]he test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.[3]

In *City of Cleveland v. Betts*[4] the Ohio Supreme Court said that this was not the exclusive test and that a conflict also existed when an ordinance contravened the expressed policy of the state.

Three recent cases have carefully defined a "conflict" and alleviated some of the doubts that might have been caused by the *Betts* case. In *City of Akron v. Williams*[5] the defendant was convicted under an ordinance which prohibited the possession of firearms by a person who had been convicted of a felony. His contention that the ordinance was invalid because it was in conflict with state statutes[6] was upheld by the Municipal Court of Akron. But the Court of Appeals for Summit County reversed the decision, citing favorably the test established in *Village of Struthers v. Sokol.*[7] The Ohio Supreme Court dismissed the defendant's appeal.[8]

The test established in the *Sokol* case was referred to by the Lucas County Court of Appeals in *City of Toledo v. Best.*[9] There the defendant was charged with the violation of the Toledo ordinance which prohibits driving while intoxicated. The court would not accept the defendant's contention that the ordinance was invalid because it was in conflict with Ohio Revised Code sections 4511.19 and 4511.99(B). The conflict, argued the defendant, resulted from a variation in the penalties prescribed

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* This article was written by Richard H. Kraushaar with the guidance of Samuel Sonenfield, formerly Associate Professor of Law at Western Reserve Law School.

1. OHIO CONST. art. XVIII, § 3.

2. 108 Ohio St. 263, 140 N.E. 519 (1923).

3. *Ibid.* For a more detailed discussion, see Blume, *Municipal Home Rule in Ohio: The New Look,* 11 WEST. RES. L. REV. 538, 542, 552 (1960).

4. 168 Ohio St. 386, 154 N.E.2d 917 (1958). In this case the ordinance defined the carrying of a concealed weapon as a misdemeanor while the statutory enactment made the identical offense a felony. Under the *Sokol* test the ordinance did not permit what the statute prohibited, but the court declared the ordinance invalid.

5. 113 Ohio App. 293 (1960), *appeal dismissed,* 172 Ohio St. 287 (1961).

6. OHIO REV. CODE § 2923.01. "No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed . . . ." The court of appeals pointed out that this statute dealt only with what weapons could be carried, not with the problem referred to by the ordinance of *who* could possess the weapons. The court also disregarded the defendant's argument that the state had pre-empted the field by legislation on the subject of possessing and carrying firearms.

7. 108 Ohio St. 263, 140 N.E. 519 (1923). In City of Akron v. Williams, 113 Ohio App. 293 (1960), the ordinance did not prohibit that which the statute permitted, because the statute did not legislate *who* could carry firearms.

8. City of Akron v. Williams, 172 Ohio St. 287 (1961).

9. 113 Ohio App. 380, *aff'd,* 172 Ohio St. 371 (1961).

by the ordinance and the statute.[10] The court of appeals citing the *Sokol* case, held that an ordinance is not in conflict with a general law merely because different penalties are provided for the same acts.[11]

Finally, the *Sokol* test was reaffirmed in *City of Akron v. Criner.*[12] Here the defendant was found guilty in Akron Municipal Court of violating an Akron ordinance prohibiting intoxication. The court gave no credence to the defendant's contention that the ordinance was in conflict with Ohio Revised Code section 715.55, which also prohibits intoxication. The defendant argued that there was a conflict since the statute ordered punishment for intoxication when a person disturbed the *good order and quiet* and the ordinance did not mention this element. The court cited the *Sokol* case and held the ordinance valid.[13]

These cases reaffirm the importance of the *Sokol* test in determining when an ordinance is in conflict with a statute under article XVIII, section 3 of the Ohio Constitution and alleviate some of the doubts which might have been caused by the *Betts* case.[14] These cases are important as they exhibit a favorable attitude by the courts toward municipal home rule. For all practical purposes, the courts, by promulgating an all-encompassing definition of a "conflict" in this context, could have minimized the significance of the constitutional grant.

INDIVIDUAL V. MUNICIPAL CORPORATION

The two areas of conflict between the rights of an individual and the acts of a municipality are in zoning and the municipality's tort liability. In the former, it appears that the individual must adhere to formal pro-

10. Ohio Revised Code section 4511.99 (B) states "[N]o court shall suspend the first three days of any sentence provided for under this section." The Toledo Municipal Code states that a violation of a municipal ordinance relating to driving while intoxicated is punishable by ". . . a fine of not more than five hundred dollars or imprisonment in the county or municipal jail for more than six months . . . ." The conflict arises because imprisonment under this municipal ordinance is governed by Ohio Revised Code section 2947.13, which permits a court to ". . . suspend such sentence in whole or in part . . . ." Therefore, the defendant contended that the ordinance permitting suspension of the entire sentence conflicted with the state statute involving the same offense but providing that no court could suspend the first three days of the sentence.

11. City of Toledo v. Best, 113 Ohio App. 380, 383 (1960), *aff'd,* 172 Ohio St. 371 (1961). For a more detailed discussion of this proposition, see Sonenfield, *Survey of Ohio Law — Municipal Corporations,* 12 WEST. RES. L. REV. 531, 536-38 (1961).

12. 112 Ohio App. 191, 175 N.E.2d 746 (1960).

13. The court went even further in this case, stating that the state statute was "needless legislation," since the municipality under constitutional home rule was empowered to legislate on the matter. *Id.* at 193, 175 N.E.2d at 748. It is difficult to determine the basis for the court's decision — the lack of conflict under the *Sokol* test or the statute's interference in the realm of municipal home rule.

14. These cases by no means indicate the rejection by the courts of the test in the *Betts* case. In fact, no mention was made of this point in the opinions discussed. It seems reasonable to predict that the test expounded by the *Betts* case will be adopted when the facts of a case more clearly interfere with state policy. These cases are noted to rid the practicing attorney of any notion that the *Betts* case overruled the "conflict" test in the *Sokol* case.

cedure or lose his right to use his property as he wishes; while in the latter, the municipality's tort liability has been expanded to protect the individual to a greater extent.

Zoning — Determination of Applicant's Rights

The Supreme Court of Ohio reaffirmed in *Gibson v. City of Oberlin*[15] the general rule as to when an applicant's rights to use his property are fixed. It stated that the rights are fixed by the provisions of the zoning ordinance as of the time he perfects an application for a building permit which is in conformity to the ordinance as it stands, and not by the ordinance as it is subsequently changed. This general rule was recently referred to in *State ex rel. Mar-Well Incorporated v. Dodge*[16] by the Summit County Court of Appeals. However, this rule as applied to the facts in the *Mar-Well* case presents a problem for the potential land-user that must be carefully probed.[17]

In the *Mar-Well* case the applicant had his allotment plat approved and recorded and had done some grading and other improvement before the zoning change was made. The court said that these actions did not irrevocably fix the rights of the parties so long as an application for use of the premises had not been filed.[18]

It appears from the decisions in *Smith v. Juillerat*[19] and in the *Mar-Well* case that the applicant must not err in his procedure to vest his rights in the land, for he will not be protected by the general rule expressed in the *Gibson* case. The courts do not seem sympathetic to the applicant's arguments that his rights can vest without formal application or that he has perfected a prior nonconforming use by his actions. There is an important question that remains to be answered. Can the applicant by *any* acts other than filing a formal application for a building permit vest his rights to a use in the land? The answer according to *Smith* and *Mar-Well* is in the negative, but it seems that the courts might modify their attitude if the applicant sustains a certain degree of hardship.[20]

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15. 171 Ohio St. 1, 167 N.E.2d 651 (1960). See discussion in Sonenfield, *Survey of Ohio Law — Municipal Corporations,* 12 WEST. RES. L. REV. 531, 539-40 (1961).

16. 113 Ohio App. 118, 177 N.E.2d 515 (1960). See also discussion in *Constitutional Law* section, p. 449 *supra.*

17. The problem of defining when an individual's rights to use the land become vested was previously examined in Smith v. Juillerat, 161 Ohio St. 424, 119 N.E.2d 611 (1954). In that case the applicant held a license which permitted strip mining. A zoning resolution that would have prohibited this action was pending when the license was issued. Although the applicant expended money on mining operations, the court said that the applicant had no vested right prior to the effective date of the zoning resolution.

18. State *ex rel.* Mar-Well, Inc. v. Dodge, 113 Ohio App. 118, 122, 177 N.E.2d 515, 519 (1960).

19. See note 17 *supra.*

20. If the applicant suffers great hardship, the courts may still refuse to hold that the applicant's rights were vested without formal application, but grant him relief on the basis of a

A recent 1961 case, *State ex rel. Martin Land Development Company v. Clepper*,[21] suggests the strict requisites which courts will demand in this situation. The applicant must do more than receive approval of his subdivision plat by a county planning commission and county engineer to vest his rights in the use of the land before a zoning change. In fact, in this case the applicant went so far as to complete the installation of the sanitary system, but the court still refused to accept his argument that his rights were vested. The court did imply by way of dictum that had residences been built on this land prior to the zoning change, a nonconforming use would have been recognized, and the applicant could have obtained relief.[22]

These cases should serve as a warning to lawyers, builders, and construction companies alike. If the formal requirements to obtain a building permit are not strictly followed by an applicant, his rights to the use of the land will not vest, resulting in a possible loss of money and time.

Tort Liability of a Municipality

Tort Liability — Proprietary Function

The general rule is that the construction of sewers is a governmental function and a municipality is therefore not liable for damages resulting from improper construction. Conversely, the maintenance of sewers is a proprietary function in the exercise of which a municipality is liable for damages resulting from the negligence of its employees.[23] The question becomes difficult when the courts are presented with determining whether the municipality was negligent in the construction or in the repair of the sewer. This problem was present but overlooked by the court in *Ball v. Village of Reynoldsburg*.[24]

In this case the plaintiff contended that an eight-inch sewer line installed by the village was insufficient to handle the sewage because of recent building developments. This overloading resulted in the back-up of sewage in the plaintiff's basement causing considerable damage. The court of appeals ignored the defendant village's contention that it had not authorized the overloading of the sewer and held that an affirmative act is not always necessary in order to create liability against a munici-

nonconforming use. There is a hint of this reasoning in the *Mar-Well* case. 113 Ohio App. 118, 124, 177 N.E.2d 515, 520 (1960).

21. 113 Ohio App. 375, 174 N.E.2d 271 (1961).

22. *Id.* at 379, 174 N.E.2d at 274.

23. For a general discussion of this problem, see FARRELL, MUNICIPAL CORPORATIONS IN OHIO § 15.13, at 273-74 (1955); RHYNE, MUNICIPAL LAW § 30-23, at 769-73 (1957). The multiplicity of rules and variety of rationale used by the courts of all states indicate the confusion present in this area.

24. 176 N.E.2d 739 (Ohio Ct. App. 1960).

pal corporation. The court continued by saying that liability resulted in this case because the municipal corporation failed to maintain an adequate system.[25]

The question which remains unanswered in this area is whether the village was negligent in failing to install a larger sewer at the time of construction or negligent in failing to maintain a sewer sufficient to handle the problem. The courts have ignored this distinction, a distinction which seems important because the municipality is not liable for negligent installation but is liable for negligent repair. The courts are faced with a dilemma when required to define construction and maintenance, for liability will rest upon a determination of this issue. This entire problem is the result of the irrational general rule relating to the municipality's duty to construct and maintain a sewage system. The case has significance in this era of numerous building developments with their foreseeable sewage problems.

Tort Liability — Defect in a Sidewalk

The confusion in the area of municipal liability for defects in sidewalks results from the decisions in *Kimball v. City of Cincinnati,*[26] and *Griffin v. City of Cincinnati.*[27] The recent case of *Reeves v. City of Springfield*[28] does not solve the problem. In the instant case the plaintiff was injured when she tripped in a two to three inch hole in the sidewalk of the municipality. The Court of Appeals for Clark County analyzed the recent Ohio cases and affirmed the lower court's decision denying defendant's motion for a directed verdict. The court interpreted the *Kimball* case as holding that there was no definite variation in the height of a defect which classified it as a defect as a matter of law or a defect that must be submitted to the jury. This interpretation is questionable

25. *Id.* at 740.

26. 160 Ohio St. 370, 116 N.E.2d 708 (1953). Here the Ohio Supreme Court reversed the lower court, holding that the defect did not constitute a nuisance under Ohio Revised Code section 723.01, and sustained a motion for a directed verdict in favor of the city. The court quoted from the New York Court of Appeals decision in Gastel v. New York, 194 N.Y. 15, 86 N.E. 833 (1909), where it was held, *as a matter of law,* that any defect under four inches was not a nuisance.

27. 162 Ohio St. 232, 123 N.E.2d 11 (1954). The court repudiated a great deal of its opinion in the *Kimball* case. Here it was held that a two-inch defect did not constitute a nuisance, but the lower court would *not* rule as a matter of law and submitted the case to a jury. Although the municipality was exonerated from liability by the jury, the supreme court's affirmance of the jury's verdict, rather than affirming as a matter of law, represented a change in approach from that taken in the *Kimball* case.

However, since the decision in the *Griffin* case, the Supreme Court of Ohio has apparently reaffirmed its decision in the *Kimball* case. See, *e.g.,* Amos v. City of Cleveland Heights, 169 Ohio St. 367, 159 N.E.2d 895 (1959); Kindle v. City of Akron, 169 Ohio St. 373, 159 N.E.2d 764 (1959).

28. 111 Ohio App. 387, 171 N.E.2d 175 (1960). A motion to certify to the supreme court was overruled on October 5, 1960.