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Municipal Corporations

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for, a forfeiture of the estate by reason of its use as a house of prostitution[3] did not unjustly enrich the landlord.

In a somewhat similar vein, the court of appeals[4] held that when premises are leased for use in the sale of liquor and food, a refusal of the Ohio Board of Liquor Control to approve a permit to sell liquor does not void the lease. The premises could still have been used to sell food.

The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by neglect or design have omitted from their own contract.[5] The contingency involved was foreseeable but not contracted against.

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MUNICIPAL CORPORATIONS

Municipal Ordinance Prohibiting Sale of Beer on Sunday Held Invalid

The Council of the Village of Paulding duly enacted an ordinance forbidding the sale on Sundays of beer or intoxicating liquor. Plaintiffs were the holders of permits issued by the Ohio State Department of Liquor Control which permitted sale of beer and intoxicating liquors. Plaintiffs brought an action against the village and the officials thereof who were charged with enforcement of its ordinances, praying for an order construing the ordinance to be in conflict with the Ohio Constitution[1] and laws of the state of Ohio[2] and with a pertinent regulation of the Liquor Control Board,[3] and restraining its enforcement. In *Kaufman v. Village of Paulding*[4] the Court of Appeals of Paulding County held that the ordinance was valid and enforceable insofar as it forbade the sale of intoxicating liquor on Sunday, but invalid and unenforceable with respect to prohibiting the sale of beer on Sunday.

The court pointed out that since the decision in *Akron v. Scalera*,[5] the Ohio Board of Liquor Control had adopted Regulation 49, which forbids the sale of beer by any permit holder on Sunday between the hours of 1:00 o'clock A. M., and 5:30 o'clock A. M., and that the Ohio Supreme Court in *Neil House Hotel Co. v. Columbus*[6] made any municipal ordinance attempting to regulate the matter invalid insofar as it came into conflict with Regulation 49. Since the department impliedly permitted the sale of beer on other hours on Sunday no municipality can by mere ordinance forbid it.

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[3] OHIO REV. CODE § 3767.10 (OHIO GEN. CODE § 6212-12)

[4] Goodman v. Sullivan, 94 Ohio App. 390, 114 N.E.2d 856 (1952)

Montgomery v. Board of Educ., 102 Ohio St. 189, 131 N.E. 497 (1921).

It must probably be conceded that in view of the *Neil House* case, the court of appeals reached the correct result. The target of criticism should probably be the supreme court's opinion. It is not an inescapable conclusion that from a prohibition on all sales between 1:00 o'clock A. M., and 5:30 o'clock A. M., the Board intended to grant a blanket permission to sell at all other times. True, it is elsewhere provided[7] that a municipal corporation may adopt an earlier closing hour for the sale of intoxicating liquor on Sunday, or prohibit it, but it seems a strained construction to deduce therefrom an absolute prohibition upon the regulation of sale of beer. It certainly does not even give "lip service" to the constitutional right of home rule,[8] which ought not to be denied by mere implication from ambiguous language of an administrative regulation, no matter what its legislative sanction.

Annexation Held Not A Function of Local Self-Government

The Ohio Constitution provides all municipalities in the state may " adopt and enforce within their limits such local police, sanitary, and other regulations as are not in conflict with general laws."[9] Following a recent case[10] in which it was held that charter provisions attempting to regulate matters of annexation to a municipality were unconstitutional, (since annexation is not a proper local matter and does not fall within the constitutional grant of local self-government) the Court of Appeals for Hamilton County in *Cincinnati v. Rost* and in *Reitz v. Morr*[11] had before it two cases involving annexation as against incorporation.

One group of residents of an unincorporated territory desired to incorporate it into an independent municipality. Another group sought to annex it to the adjoining City of Cincinnati. The City of Cincinnati desired to annex the territory itself. The advocates of annexation got the head start, having commenced their proceedings first under applicable statutes,[12] but,

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[1] OHIO CONST. Art. XVIII, § 3.

[2] OHIO REV. CODE §§ 4301.03, 4301.04, 4301.05, 4304.02, 4303.24, 4304.27, 4303.28, 4301.21 (OHIO GEN. CODE §§ 6064-3, 6064-15, 6064-20, 6064-22)

[3] Regulations, Board of Liquor Control, No. 49.

[4] 92 Ohio App. 169, 109 N.E.2d 531 (1951).

[5] 135 Ohio St. 65, 19 N.E.2d 279 (1939).

[6] 144 Ohio St. 248, 58 N.E.2d 665 (1944).

[7] OHIO REV. CODE § 4301.22 (OHIO GEN. CODE § 6064-22).

[8] See note 1, *supra.*

[9] *Ibid.*

[10] Schultz v. Upper Arlington, 88 Ohio App. 281, 97 N.E.2d 218 (1950).

[11] Both at 92 Ohio App. 8, 109 N.E.2d 290 (1952).

[12] OHIO REV. CODE §§ 709.01-709.12 (OHIO GEN. CODE §§ 3547-3557-1).

because of differences in time schedules prescribed, the petition for independent incorporation could have been effected before annexation was completed.

The annexers sought to enjoin further prosecution of the incorporation petition. The incorporators sought to enjoin further proceedings on the annexation action until the validity or invalidity of the incorporation proceedings had been determined.

The court of appeals, in a Solomonic judgment, sustained demurrers to both petitions, but for different reasons. It held with respect to the claim of the pro-annexation faction that the City of Cincinnati was not a proper party plaintiff, since it was not a "person interested" within the meaning of the statutes[13] permitting any person interested to make application for an injunction within ten days of the filing of the papers with the county recorder; that the City of Cincinnati was not interested in view of the prior holding that annexation is not a matter of local self-government, and that since the incorporation papers had not yet been filed, the action was prematurely brought.

It held with respect to the claim of the pro-incorporation faction that since its petition did not contain any allegation that its action was prior in time to that of the annexers, it stated no cause of action. The petition presented " a case of clash between two agencies without furnishing any basis for deciding which has the prior right to proceed,"[14] citing the rule that when power is given under the statutes to two different governmental boards to act with reference to the same subject matter, exclusive authority to act is vested in that which first acts under the power.[15]

Civil Service — Eligibility To Take Examination

The supreme court had before it in *State* ex rel *Ritter v. Urban*[16] a problem of eligibility to take a civil service examination. The Civil Service Commission of the City of Cincinnati scheduled an examination for the position of fire captain and established as a requirement for eligibility to take such examination that applicants have had at least two years' service as lieutenants prior to the date of the examination.

Respondent brought a mandamus action to compel the Commission to accept his application to take the examination, despite the fact that he had not completed two years' service in the lower rank. He was defeated in all the courts in which the action was tried and to which it was appealed. By

[13] OHIO REV. CODE §§ 707.20, 707.11 (OHIO GEN. CODE §§ 3531, 3532)

[14] 92 Ohio App. 8, 14, 109 N.E.2d 290, 293 (1952).

[15] See Trumbull County Board of Educ. v. State *ex rel.* Van Wye, 122 Ohio St. 247, 171 N.E.241 (1930).

[16] 159 Ohio St. 46, 110 N.E.2d 708 (1953).

the time, however, that he had pursued his appeal to the supreme court (the holding of the examination having meanwhile been postponed by temporary restraining order because of the pending litigation) he had accomplished his two years in grade. He again applied for acceptance of his application to take the examination and was again refused, on the ground that his new application must be considered to have dated back to the time of his earlier unsuccessful one.

In a new mandamus action the supreme court held that he was entitled to take the examination. In the absence of bad faith on his part in bringing the first action, and even though he was unsuccessful therein, he was not required to have his eligibility determined as of the time for which the original application was scheduled, but as of the date of the actual examination.

The court in reaching its decision stated that the commission was without authority to promulgate a two-year rule in view of the statutory requirement of the code[17] that no person in a fire department shall be promoted to a position in a higher grade who has not served at least twelve months in the next lower grade.

Two questions might be asked: what tests of bad faith will the courts require, and, does the statutory minimum for promotion necessarily preclude a higher minimum? The fact that temporary restraining orders against the giving of the earlier examination were granted by the courts hardly seems an adequate pragmatic test of the petitioner's good faith, (if that is any issue at all), and the conversion of the minimum time-in-grade requirement of the statute into an absolute standard hardly does justice either to home rule or to the rules of statutory construction.

Validity of Urban Redevelopment

State ex rel. *Bruestle v. Rich*,[18] involved numerous and varied aspects of urban redevelopment in Cincinnati under the federal Housing and Rent Act of 1947, as amended in 1949.[19] An action was brought in mandamus to compel the execution by city officials of a note evidencing a loan from the United States to the city to pay the cost and expense of slum clearance and rebuilding, either by the city or private enterprise, or both.

The opinion of the court is entirely too long to discuss in all its implications in the short space allowable in this survey. The principal issues decided are hereinafter summarized, in the hope that the interested reader will refer to and seriously consider the complete report of the case.

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[17] OHIO REV. CODE § 143.34 (OHIO GEN. CODE § 486-15a).

[18] 159 Ohio St. 13, 110 N.E.2d 778 (1953).

[19] See also Urban Redevelopment Law, OHIO REV. CODE §§ 725.01-725.11 (OHIO GEN. CODE §§ 3941-3951).

1. While the supreme court is loath to entertain "amicable" actions brought and involving a bona fide justiciable controversy, and to render what are "in reality merely advisory opinions,"[20] it would follow its established practice of doing so, and particularly in this case, since property owners who opposed the action which the petition sought to require of the respondents had been permitted to intervene and had vigorously contested the petition.

2. The validity of redevelopment projects contemplating acquisition by the city, either by purchase or by eminent domain proceedings, of property in a blighted area, the clearing therefrom of buildings and making the land available for redevelopment, after installing public utilities and other improvements, and the resale for redevelopment with restrictions which will insure against recurrence of slum conditions, has with one exception been sustained by courts of last resort in other states.

3. The exercise of the right of eminent domain under such a project violates neither the federal nor the Ohio Constitution.

4. "Public use" as used in Section 19 of Article I of the Ohio Constitution is not to be given a restricted use, nor do the purposes therein set forth constitute a restriction. It is not required that the property be taken or acquired *exclusively* for the public use. Slum clearance is a public use.

5. The determination of what is a public use is primarily a function of the legislative body of the municipality and will not be overruled by the courts unless *manifestly* arbitrary or unreasonable.

6. Even though the purchase or condemnation of a fee of the real estate in the slum area involves acquisition of a greater interest in the realty than is actually necessary to accomplish the purposes of removing and preventing slums, appropriation of the whole fee may be justified by the constitutional permission[21] to acquire an excess and sell it with such restrictions as shall be appropriate to preserve the improvement made.

7 Under the Ohio Constitution no general laws may interfere with the exercise by municipalities of their power of eminent domain.

8. The mere presence within the area to be acquired and cleared of some buildings which are not substandard, or of vacant areas, does not prevent the exercise of the power to acquire the entire area.

The acquisition by purchase or eminent domain of lands and buildings which could be condemned under the police power does not constitute a loan of the city's credit to the owners thereof.

10. The fact that the city during its ownership of the land will make improvements thereon does not constitute a loan of the city's credit to prospective purchasers thereof, since the contribution of the city will be reflected

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[20] State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 20, 110 N.E.2d 778, 783 (1953).

[21] OHIO CONST. Art. XVIII, § 10.

in the value of the redeveloped property. (Quaere: what about the fact that the federal government agrees to make the city, at the conclusion of the project, a "capital grant" in an amount equal to two-thirds of the "net loss to be sustained in connection with the project"?) The writer of this synopsis can only apologize for his feeble effort to condense so much into so little space.

Zoning — Regulation of Removal of Loam and Topsoil

An unusual application of the concept of zoning was upheld by the Court of Appeals of Cuyahoga County in *Miesz v. Mayfield Heights.*[22] The case involved an ordinance of the municipality, enacted pursuant to the Ohio Constitutional[23] and statutory provisions[24] permitting municipalities to zone their lands, which regulated the removal of loam and topsoil from land areas located in certain use districts in the village, unless in conformance with a permit to do so, and providing for inspection and performance bonds. The ordinance also provided for regulation of the method of stripping and of the depth of soil to be left on the land, and for reseeding or replanting.

While the village council in stating its reasons for the enactment of the ordinance mentioned the *unsightly* results from uncontrolled stripping, it also alluded to the noise and dust caused by the operation, the retardation of development as useful districts, and the drainage and other health and safety hazards caused. The court held that the power to zone extends to regulation of the stripping and removal of topsoil. Indulging the presumption of validity which applies to legislative acts, and pointing out that the plaintiff had not met the burden of showing the provisions of the ordinance as applied to his property to be unreasonable, arbitrary, or capricious, or to have no relation to the public health, safety, morals or public welfare, the court then noted that topsoil supports desirable vegetation, holds water and prevents erosion, that its removal tends to alter drainage patterns, create stagnant pools of water, overtax drainage facilities, and to result in economically blighted areas. The ordinance was therefore a reasonable exercise of the police power, promotive of the public health, safety and general welfare, and in accord with the constitution and statutory law of Ohio.

Moral Claims

One of the least defined and definable areas in the law of Municipal Corporations is that of "moral claims" or "moral obligations." Ordinarily

[22] 92 Ohio App. 471, 111 N.E.2d 20 (1952).

[23] OHIO CONST. Art. XVIII § 3.

[24] OHIO REV. CODE §§ 713.01-713.13 (OHIO GEN. CODE §§ 4366-1-4366-12d).

taxes may be levied and public moneys expended only upon obligations enforceable by legal action. But the law has long recognized the fact that tax moneys may occasionally be expended upon private persons who assert a claim against a municipality arising out of no legal obligations other than "moral obligation" or "considerations of justice."

There is no reconciling many of the situations. By their very nature they defy cataloguing or categorizing.

In *State* ex rel. *Caton v. Anderson*[25] the supreme court held that the City of Toledo had the right to pay as a moral claim the sum of $2000.00 to a former employee whose application for compensation from the state insurance fund for loss of his arm had not been filed with the industrial commission within the time prescribed by law, due to the failure of an employee of the city who processed it to do so. The injured employee was without fault, but, of course, had no claim against the fund and no legally enforceable one against the city.

No one can have any serious quarrel with the result.

Eminent Domain

The right of a municipality to acquire real estate by appropriation in order to pass it on to another corporate entity was involved in *Langenau Mfg. Co. v. Cleveland.*[26] The City of Cleveland is constructing an extensive rapid transit system. In order to do so it is taking over from the Nickle Plate Railroad two of that road's tracks. In order to continue to use its facilities, the Railroad will build two new tracks immediately to the north of those which it gives up to the city. To construct the new tracks it will be necessary to appropropriate improved land owned by the plaintiff manufacturing company. Plaintiff sought an injunction.

The supreme court, following authority in other jurisdictions, upheld the city's right to take the land by eminent domain, despite plaintiff's contention that since the city would not use plaintiff's land itself, but would exchange it for land owned by another entity which also had the power of eminent domain, the city could not be held to be taking for a municipal and public purpose. The court likewise denied plaintiff's contention that the use of municipal funds to condemn property for a right of way for a private corporation constituted a loan of the city's credit.[27]

Regulation of Solicitation of Funds by Charities

Ordinances of the City of Dayton regulating the solicitation of funds by

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[25] 159 Ohio St. 159, 111 N.E.2d 248 (1953)

[26] 159 Ohio St. 525, 112 N.E.2d 658 (1953).

[27] See OHIO CONST. Art. VIII § 6.

[28] See p. 252 *supra.*