Constitutional Law

LEGAL AUTHORITY TO PROPOSE CONSTRUCTION OR ACQUISITION OF MUNICIPAL UTILITIES BY INITIATIVE PETITION—APPLICABILITY OF SEC 10216, GENERAL CODE—EQUITY—FORM OF INJUNCTION

The Ohio Power Company brought this action for an injunction seeking to restrain the Board of Elections of Columbiana County from submitting to the electors of the City of East Liverpool, a proposed initiative ordinance for the purchase or construction of a municipal power plant. The plaintiff in its petition alleged and the demurrer thereto admitted that the initiative petition was filed with the City Auditor on Thursday, September 13, 1934; that at 9:45 A. M. on Monday, September 24, 1934, the City Auditor certified the petition to the Board of Elections; and that at 11:00 A. M. on the same day, the Ohio Power Company attempted to inspect the petition in the office of the City Auditor in order to complete a check it was making as to the authenticity and validity of the signatures thereto, and was at that time informed of the previous certification of the petition to the Board of Elecions.

The plaintiff founded its application for injunction on two theories: first, that the electors of the City of East Liverpool have no legal authority to propose this ordinance by an initiative petition (a constitutional question); second, that the City Auditor certified the petition to the Board of Elections of Columbiana County before the expiration of the time stipulated by the statutes of Ohio.

The trial court denied the Ohio Power Company's prayer for relief, but on appeal of the cause, the Court of Appeals of Columbiana County rendered a decree whereby the Board of Elections was in absolute terms enjoined from submittting the initiative petition to a vote of the people. Although the Court of Appeals in its opinion accepted both of the plaintiff's contentions in support of the decree, the Supreme Court of Ohio affirmed the decree on the basis of the second contention of the plaintiff when it held that no constitutional question was involved. *Ohio Power Co.* v. *Davidson*, 128 Ohio St. 614, 192 N.E. 882 (October 24, 1934).

Since the Supreme Court predicated its holding on the basis of the plaintiff's second contention (thus eliminating any necessity for rendering an opinion as to the constitutional question presented), the second contention will here be discussed first.

The proposition that the injunction should issue because the City Auditor certified the initiative before the time permitted by law, involves the conjunctive interpretation of Section 4227-1 and 4227-8, Ohio General Code (Municipal Initiative and Referendum Act) along with Section 10216 of the Ohio General Code. Section 4227-8 provides; ". . . after a petition has been filed with the City Auditor . . . it shall be kept open for public inspection for ten days . . ." It is stipulated in Section 4227-1 that ". . . said City Auditor shall after ten days, certify the petition to the Board of State Deputy Supervisors of Elections . . ." Section 10216 of the General Code states: "Unless otherwise specifically provided, the time within which an act is required by law to be done shall be computed by excluding the first day and including the last; except that the last shall be excluded if it be Sunday."

There is considerable authority in support of the conclusion of both the Court of Appeals and of the Supreme Court to the effect that Section 10216 is applicable to cases where the act is to be done *after* as well as *within* a stated period of time and therefore that this section should be applied to the situation presented in the principal case.

This section has been liberally construed so as to be applicable to all cases involving the computation of time in so far as it is legally possible to apply the provisions of that statute. Although the statute specifically states that its terms are to be applied where "an act is required by law to be done, it has been interpreted to include acts permitted by law to be done." *State* v. *Elson,* 77 Ohio St. 489, 83 N.E. 904 (1908). It was held in the same case that the statute was to be applied to criminal as well as to civil cases involving the computation of time.

In *Neiswander* v. *Brickner,* 116 Ohio St. 249, 156 N.E. 138 (1927), Section 10216 was interpreted to be applicable to all acts permitted or required by law to be done and is not restricted in application to Part Third of the Ohio General Code in which Part this statute is set out.

The spirit with which this statute has been construed is clearly deducible from the following excerpt from the opinion of the court in *State* v. *Elson,* (supra): "The mode of computing time in any particular case or class of cases is of far less importance than that there should be some established and uniform rule on the subject. Obviously it is not for the public good nor in the interest of the due administration of justice that there should be two rules or that the rule should be different or less certain in criminal than it is in civil cases. In our opinion this rule of the statute should be followed and applied in the interpretation and construction of all statutes, save those where the language of the provision as to time, itself clearly forbids it."

Even though the provisions of Section 10216 be interpreted as applicable to the facts of the principal case, and conceding that the City Auditor of East Liverpool exceeded his authority in certifying the initiative to the Board of Elections before midnight of Monday, September 24, 1934, it does not of necessity follow that the injunction should issue in the absolute form in which it was decreed. Would not the interests of all the parties involved in this case have been better conserved by enjoining the defendants from placing the petition on the ballots until the plaintiff was given an opportunity to examine the petition for a period of time equivalent to that which they were illegally deprived of examination? An injunction rendered in this conditional form would restore to the plaintiff the benefits intended to be bestowed on it under the provisions of Section 10216, and at the same time signers of the initiative petition would not be deprived of the right to have their proposal submitted to the electors for their approval.

It is a general doctrine of equitable jurisprudence that a court of equity is not bound in its relief to the prayer of the petitioner, but rather that its decree will be formulated so as to do complete equity as to all the parties affected by the degree.

In the case of *Heywood* v. *Federated Lutheran Benevolent Society et al.*, 29 O.L.Rep. 423 (1927) at page 428, the court in speaking of remedy by injunction said: "It will be conceded that a court in its use of this extraordinary power should do so with caution and only after thoughtful consideration. This remedy should only be applied in clear cases and *in such a manner* as to prevent injustice and unnecessary injury." (Italics, the writer's). This foremost principal of equity was clearly demonstrated by the statement of the court in *McMillan* v. *Barber Asphalt Paving Co.*, 151 Wis. 48, 138 N.W. 94 (1912): "Equity may in all cases so frame its decrees as to make them effective to do equity, and the forms of equitable relief are as various as the transactions investigated and regulated in equity." A statement of similar import is set out in *Murtha* v. *Curley*, 90 N.Y. 372 (1882): "A court of equity adopts its relief to the exigencies of the case in hand."

The Court of Appeals of Columbiana County upheld the contention of the Ohio Power Company that there is no legal authority for the submission of an initiative petition proposing the purchase or construction of a municipal power plant to the electors of a municipality.

The authority of a municipality to purchose or construct a power plant is derived from the provisions of Article XVIII, Section 4, of the Constitution of Ohio, which states: "Any municipality may 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. . . ." Article XVIII, Section 5, prescribes the manner in which this authority is to be exercised: "Any municipality proceeding to acquire, construct, own, lease, or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission."

The right of the initiative and referendum is contained in Article II, Section 1-f of the Ohio Constitution which reads as follows: "The iniative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law."

Standing alone this constitutional provision would bestow the right to propose the purchase or construction of a municipal power plant by means of an initiative ordinance. The Court of Appeals in the instant case declared that this right was precluded by virtue of the provisions of Article XVIII, Section 5, arguing that "If the proposed ordinance were submitted and a majority of the electors voted in favor of it, the effective date of said initiated ordinance would be suspended for a period of thirty days within which to file a referendum petition, to be submitted to the electors of said municipality at a special or general election following said date, which had prior to that time been submitted to the electors under an initiative petition. Such action in our opinion, would be an absurdity."

Article XVIII, Section 5, is part and parcel of the Home Rule Amendment to the Constitution of Ohio as adopted on September 3, 1912. By this amendment municipalities were given a wide range of powers in carrying on the business of local government. In particular were they given broad powers in regard to the acquisition or construction of public utility service systems.

Keeping in mind the fact that Article II, Section 1-f was adopted at the same time as Article XVIII, Section 5, and that the intent of the

people in adopting the former amendment was to preserve to themselves the authority to initiate legislation or to review the legislation of their Councils, it seems unreasonable that they should deprive themselves of this authority to initiate legislation in regard to one of the most important rights of municipalities, that of proposing the acquisition or construction of utility service systems.

That such was not the intent of the people is further suggested by the fact that a perusal of the Constitutional Debates, the official record of the Constitutional Convention of 1912, reveals no argument as to the meaning of Article XVIII, Section 5, while considerable debate arose in regard to the other provisions dealing with municipal ownership of utilities.

It is suggested that if the provisions of Article XVIII, Section 5, were intended to be a limitation on the broad powers bestowed on the people by Article II, Section 1-f, such limitation would have been expressed in unequivocal terms. Such powers ought not be denied the people by mere conjecture.

The following principle laid down by the court in *State ex rel.* v. *Creamer*, 83 Ohio St. 412, 94 N.E. 831 (1911), is peculiarly adaptable to the facts of the principal case: "The rule that an instrument must be construed as an entirety applies with even more force to constitutions than to other instruments."

This principle is stated in more definite language in the case of *Fitzgerald* v. *Cleveland*, 88 Ohio St. 338, 103 N.E. 512 (1913), where the court in referring to Article V, Section 7, said at page 351: "It will be remembered that this section and Article XVIII were adopted as amendments to the constitution on the same day. By that adoption they became parts and provisions of the same instrument. There are well established rules by which they must be weighed. They must be construed together and effect given to them both. Differences, if there are any, must if possible be reconciled."

The contentions of the defendant in the principal case are supported by the decision of the court in *Goodman* v. *Hamilton*, 21 Ohio App. 465, 153 N.E. 217 (1927). Since the situation presented in that case is so similar to that of the principal case, it will be well to quote the court's language at length; at page 468 the court said: "Section 5 of Article XVIII would be a limitation on the act of Council in enacting an ordinance with reference to public utilities, it especially conferring the right of referendum on an ordinance enacted by Council.

"This view seems to be strengthened by the fact that other sections of the Constitution give legislative bodies the right to declare emergency

legislation; but under this section, there could be no emergency with reference to an ordinance passed authorizing a contract with a public utility.

"If we give effect to the general provision of the Constitution (referring to Article II, Section 1-f), the authorizing statutes enacted thereunder, and the special provision relating to ordinances enacted by Council, *the only construction that could be given to the latter would be that it was a limitation on the powers of Council and did not in any way effect the rights reserved to the people to initiate an ordinance authorizing a contract.*" (Italics, the writer's).

Since the Court of Appeals in the principal case issued a decree of injunction on the basis of the constitutional question raised, and since the court in *Goodman* v. *Hamilton*, (supra) reached a directly opposite conclusion, it is to be regretted that the Supreme Court of Ohio refused to pass on that particular question when it held that there was no constitutional question involved.

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POWER OF COURT OF APPEALS TO GRANT REVERSAL ON WEIGHT OF EVIDENCE — JURISDICTION.

The case of *Werner* v. *Rowley*, 129 Ohio St. 15, 193 N.E. 623, 1 Ohio Op. 303, 16 Abs. 378 (1934), involved an action for personal injuries. The plaintiff recovered a verdict in the first trial which on the defendant's motion was set aside as being against the weight of the evidence. On the second trial of the cause, the plaintiff again received a verdict to which the defendant objected again on the grounds that it also was against the weight of the evidence. While the Court of Appeals considered other errors assigned, it refused to consider the assignment that the verdict was against the weight of the evidence and held that by the cases of *Cleveland Ry. Co.* v. *Trendel*, 101 Ohio St. 316, 128 N.E. 136 (1920), and *Rolf* v. *Heil*, 113 Ohio St. 113, 148 N.E. 398 (1925), it was precluded from so doing. In the *Werner case*, supra, the Supreme Court overruled these cases and held Section 11577, General Code, unconstitutional as applicable to the facts of that case. Although not so stated in the opinion the decision in the *Werner* case also overrules *Mahoning Valley R.R. Co.* v. *Santoro*, 93 Ohio St. 51, 112 N.E. 190 (1915), which held in effect that when the Court of Appeals has granted one reversal on the weight of the evidence, it cannot grant a second reversal on the same ground. The statute provides that the trial court shall not grant more than one new trial on the