

June 1962

## Municipal Corporations--Power to License Plumbers Denied

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### Recommended Citation

John E. Busch, *Municipal Corporations--Power to License Plumbers Denied*, 64 W. Va. L. Rev. (1962).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol64/iss4/13>

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of 1947, and the only limitation which might arise would be the doctrine of laches if a plaintiff has slept on his rights. In the absence of congressional action on the question, the solution of the court seems logical.

At least one interesting question seems to present itself from the court's decision not to use a state statute in this situation. This cause of action may be brought in any court which has jurisdiction of the parties. *Douglas v. International Bhd. of Elec. Workers*, 136 F. Supp. 68 (W.D. Mich. 1955). Since this action may be brought in a state court, would the rule laid down by the court in this case preclude the state court from applying its own state statute of limitations? If the court's basic reasoning of uniformity were to be upheld, this would seem to be the only possible result. There would be no problem if Congress had set a statute of limitations, since that would be binding on state and federal courts alike. *Mitchell v. Clark*, 110 U.S. 633 (1884). But will a decision by a federal court have the same effect?

In federally created causes of action, uniformity of rights throughout the country is a desirable goal. However, it is a goal which is difficult to attain unless Congress has provided for it. The court in the principal case has struck a blow for uniformity, but whether that is the war or merely a battle will probably depend on subsequent acts of Congress, or whether this decision will be readily accepted by other courts which are faced with the same problem.

*Robert Glenn Steele*

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### **Municipal Corporations — Power to License Plumbers Denied**

*Ps* sought a writ of mandamus to compel the city of Wheeling to grant them a license to engage in the occupation of plumbing in that city. A city ordinance required a license of any person who engaged in plumbing within the corporation limits. There was no provision in the city charter authorizing the enactment of such an ordinance. *Held*, the ordinance was invalid. The city of Wheeling was not authorized by its special charter or general statute to enact an ordinance requiring a license of persons engaged in the trade or occupation of plumbing. *State ex rel. Sheldon v. City of Wheeling*, 122 S.E.2d 427 (W. Va. 1961)

A municipal corporation has, and can exercise, only powers: (1) granted by express words, or; (2) necessarily or fairly implied from an express grant, or (3) powers essential "to the accomplishment of declared objects and purposes of the corporation — not simply convenient — but *indispensable*." *Hyre v. Brown*, 102 W. Va. 505, 135 S.E. 656 (1926). The city of Wheeling in the principal case relied on a statutory provision granting to cities general powers "to protect the persons and property of the inhabitants." W. VA. CODE ch. 8, art. 4, § 10 (Michie 1961). The court pointed out that even if the statutory provisions relied upon gave the city the power to regulate plumbing, the power to license plumbers is not indispensable to such regulation. Apparently section 2 of the charter of the city of Wheeling was also relied upon, as granted by Chapter 141 of the Acts of the Legislature, 1935. That section contains a broad grant giving Wheeling "all powers possible for a city to have." This section was held ineffective as a grant of specific power in *State ex rel. Tucker v. City of Wheeling*, 128 W. Va. 47, 35 S.E.2d 861 (1945).

By the great weight of authority statutes or ordinances requiring the licensing of plumbers in the interest of public health are valid as a proper exercise of police power. Annot., 22 A.L.R.2d 818 (1952). When a corporation seeks to use this police power under a municipal charter, such power must be expressly or impliedly granted in such charter by the legislature. 37 AM. JUR. *Municipal Corporations* § 283 (1942). A municipal corporation has no powers except those expressly conferred by the legislature or clearly implied as an integral part of those granted by its charter or by general statute. When doubtful, the power will be denied. *State v. Holden*, 128 W. Va. 362, 36 S.E.2d 481 (1945). A municipal corporation is a creature of the state. It has no inherent powers. *Brackmans, Inc. v. City of Huntington*, 126 W. Va. 21, 27 S.E.2d 71 (1943). A legislature can, however, delegate to the city the special power to examine and license plumbers, and if no mode is prescribed by which that power is to be exercised, it may be carried out in such manner as municipal officials in their discretion shall determine. *State v. Stark*, 100 Mont. 365, 52 P.2d 890 (1935).

It is to be noted that Wheeling adopted its special charter, as authorized by the legislature, in 1935. In 1936 the Home Rule Amendment to the West Virginia Constitution was adopted. W. VA. CONST. art. VI, § 39(a). This amendment abolished the practice of granting special charters and reads, "The legislature shall provide

by general laws for the incorporation and government of cities. . . . Each municipal corporation . . . through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs. . . ." Cities adopting a charter under the Home Rule Amendment are given the rights and powers set forth in chapter 8A of the West Virginia Code, cited as the "Municipal Home Rule Law." W. VA. CODE ch. 8A, art. 1, § 1 (Michie 1961). It is provided in W. VA. CODE ch. 8A, art. 4, § 2 (Michie 1961), that "A city shall have the power to protect and promote public safety, health, morals and welfare by the exercise of the powers granted by this article." The power of a city to require regulatory licenses is specifically given in regard to "businesses or activities affecting the public health or safety;" and to "any other business or practice to which the police power extends." W. VA. CODE ch. 8A, art. 4, § 12 (Michie 1961). As a general proposition, a home rule city has "the powers which might lawfully be delegated to it by the legislature without waiting for such delegation." 62 C.J.S. *Municipal Corporations* § 108 (1949). It seems then that a home rule city has the power to establish regulatory licensing of plumbers. It was so held in *Mitchell v. Dixon*, 140 Tex. 520, 168 S.W.2d 654 (1943). It should also be noted that a special charter city can adopt any of the powers of a home rule city conferred by articles four and five of chapter 8A of the code. W. VA. CODE ch. 8A, art 1, § 10 (Michie 1961). But a municipal corporation operating under a special charter may not depend on a broad grant of powers in that charter to give it the powers of a home rule city, unless the special charter is amended as provided in the Municipal Home Rule Law. *State ex rel. Tucker v. City of Wheeling, supra*.

The 1961-62 budget estimates for a number of West Virginia cities indicate the licensing of plumbers as is a source of revenue. Regulatory licensing of plumbers seems especially prevalent in Kanawha County. Charleston lists 1961-62 revenue from the licensing of plumbers, but the special charter of that city, as amended by Chapter 152, Acts of the Legislature, 1901, has no specific provision upon which to base the licensing power. In contrast § 7(34) of the special charter of the city of South Charleston, as granted by Chapter 1, Acts of the Legislature, 1919, gives that city the power "to regulate the kind and manner of plumbing. . .for the protection of the health and safety of said city." The city has enacted specific ordinances carrying out this power. The city of Nitro licenses plumbing as a general charter city and thus derives its

power from W. VA. CODE ch. 8, art. 1, § 2 (Michie 1961), while the city of St. Albans requires regulatory licenses of plumbing as provided under the Municipal Home Rule Law. It is to be again noted that the court in the principal case found no statute under the provisions of chapter 8 of the West Virginia Code sufficient to give a corporation the power to require regulatory licensing of plumbers.

There exists considerable confusion between the non-home rule and home rule provisions of chapter 8 and chapter 8A of the code. There are now two sets of municipal laws, each supposedly independent of the other, but legislative enactment and court interpretation has made difficult the interpretation of many statutes in chapters 8 and 8A. To correct the existing condition of municipal laws, a revised municipal code has been drafted by the Bureau for Government Research of West Virginia University, consolidating chapters 8 and 8A into a single chapter. This consolidation and revision will soon be presented for legislative approval, and could greatly clarify existing municipal corporation law in West Virginia.

*John Everett Busch*

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### **Torts—Malpractice—Wrongful Death Action Based on Breach of Contract**

*Ps* entered into a contract with *D*, a surgeon, for the performance of a tonsilectomy on their five year old son. The child died as a result of the operation and *Ps* brought an action setting forth claims under the Wrongful Death Act and for breach of contract. The lower court dismissed the count alleging breach of contract on the grounds of legal insufficiency. *Held*, affirmed. A common law contract action will not lie against a doctor for an alleged breach of contract resulting in the death of a patient. Such breach could, however, be the basis of liability under the Wrongful Death Act, based either upon *D*'s breach of contract or upon tort, as either theory gives rise to a "default" within the meaning of the act. *Zostautas v. St. Anthony De Padua Hospital*, 178 N.E.2d 303 (Ill. 1961).

The instant case provides a basis for considering the pertinent West Virginia law in this area. The following questions are raised: May a recovery under the West Virginia Wrongful Death Act be based on a breach of contract? May a recovery be had in a malpractice action based on breach of contract where the malpractice results in the death of the patient?