Municipal Corporations—Municipal Charters—Constitutional Law

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MUNICIPAL CORPORATIONS — MUNICIPAL CHARTERS — CONSTITUTIONAL LAW.—P's petitioned the court to obtain a writ of prohibition to enjoin the Commissioners of the County Court of Kanawha County, and others, from further acts toward the incorporation of the proposed City of Belle. *Held*, writ denied. Prohibition does not lie to control the actions of a county court which is acting in an administrative capacity; and further, "Chapter 83, Acts of the Legislature, 1949, Regular Session, in so far as it relates or may be applied to municipalities in excess of two thousand population, violates Article VI, Section 39(a), of the Constitution of West Virginia, and, to that extent, is unconstitutional, null and void." Judge Given dissented as to the constitutional issue. *Wiseman v. Calvert*, 59 S.E.2d 455 (W. Va. 1950).

Since the holding in the principal case that prohibition did not lie disposed of the case, the further discussion as to the constitutionality of certain portions of chapter 83, supra, probably has the status of a dictum. However, under the circumstances it is believed this dictum has the practical effect of a holding and will be treated as such for the purposes of this case comment.

The Municipal Home Rule Amendment was ratified by the voters in 1935. W. Va. Const. Art. VI, § 39(a). To give effect to the amendment, the legislature in 1937 set up the procedure for the adoption of home rule charters by existing cities. W. Va. Code c. 8-A, art. 2 (Michie, 1949). The Home Rule Amendment reads as follows: "The legislature shall provide by general laws for the incorporation and government of cities, towns and villages. . . . Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt, and amend the charter of such corporation, or to amend an existing charter thereof. . . . Provided that any such charter or amendment thereto . . . shall be invalid and void if inconsistent or in conflict with this Constitution or the general laws of the State then in effect, or thereafter, from time to time enacted."

In *In re Proposal to Incorporate Town of Chesapeake*, 130 W. Va. 527, 45 S.E.2d 112 (1947), the court noted that there was no provision by statute for the original incorporation of cities with a population exceeding two thousand. To correct this defect the legislature in 1949 made changes in Chapter 8 of the Code to provide for the incorporation of all cities and towns whether above or below
two thousand population. In the principal case the majority of the court declared the attempt unconstitutional: "Such certificate [meaning the certificate of incorporation, W. Va. Code c. 8, art. 2 § 11 (Michie, 1949)] does not confer upon a municipality so incorporated any other powers, general or special, or any of the numerous particular powers provided for a municipality operating under a home rule charter by virtue of Chapter 56, Acts of the Legislature, 1937, Regular Session. . . . In short to apply the statute to the original incorporation of the proposed municipality of Belle, the population of which is in excess of two thousand, would deprive the electors within its area of their express constitutional right, under the Home Rule Amendment, to frame and adopt its charter." At 456. It seems that the court has interpreted the Home Rule Amendment to require that the electors of each proposed corporation must have and must in some way exercise their power to frame and adopt a home rule charter as a condition precedent to incorporation. If the court had taken due regard to several liberal rules of constitutional and statutory construction followed by the West Virginia court in the past the result might have been different.

"While legislative exposition of a constitutional provision is not conclusive, it is entitled to great weight. . . . It should not be rejected unless manifestly erroneous." State v. County Court of Kanawha County, 112 W. Va. 98, 107, 163 S.E. 815, 819 (1932). Every reasonable construction must be resorted to in order to save a statute from unconstitutionality. State v. Massie, 95 W. Va. 233, 120 S.E. 514 (1923). Any doubt as to the constitutionality of an act of the legislature will always be resolved in favor of the validity of the statute. State v. Harrison, 130 W. Va. 246, 48 S.E.2d 214 (1947).

Utilizing the above rules of construction, can it not be said that in Chapter 8 of the Code the legislature has provided by general laws for the incorporation and government of cities and towns? The certificate of incorporation therein provided brings the corporation into existence with the right "to exercise all the corporate powers conferred by the said Chapter from and after the date of this certificate." W. Va. Code c. 8, art. 2, § 11 (Michie, 1949). The electors of any city thus brought into existence wherein the population exceeds two thousand has the power and authority to frame, adopt or amend a home rule charter. W. Va. Code c. 8-A, art. 2, § 1 (Michie, 1949). Of course, until the city exercises its power, it cannot depend on any powers granted by such statute. State v. Wheeling, 128 W. Va. 47, 35 S.E.2d 681 (1945).
All the Home Rule Amendment requires by its terms is that the electors of each municipal corporation shall have the power to frame, adopt, and amend a charter. There can be no corporation until one is brought into existence by law. *Reductio ad absurdum*, can there be electors of a municipal corporation unless a corporation is first brought into existence? The Home Rule Amendment seems to require only that the electors of existing corporations shall be given the power to frame, adopt and amend a home rule charter.

Without doubt the Home Rule Amendment is ambiguously worded. Just how much home rule authority does a municipal corporation in reality have if its charter is "invalid and void if inconsistent or in conflict with this constitution or the general laws of the state then in effect, or thereafter, from time to time enacted"? Home Rule Amendment, *supra*. The legislature could, in the final analysis, provide by general laws for most, if not all, provisions of municipal charters.

If the court is to construe the Home Rule Amendment so strictly, the legislature is faced with a difficult task in attempting to find a practical method of complying with its provisions. Surely the court does not mean to infer that it is necessary that all communities adopt home rule charters as a condition precedent to incorporation. Perhaps just an agreement by the voters, as a part of the election for incorporation, to begin their corporate existence under the general provisions of Chapter 8 of the Code would be sufficient. However, if the sometimes hard-fought issue for or against incorporation must be combined with the issues always present in the adoption of a home rule charter, it is improbable that many industrial communities over two thousand population will be able to incorporate.

Until such time as the legislature or the court has clarified the procedure for the incorporation of cities having a population of more than two thousand, it seems that communities such as Belle should first attempt to incorporate some compact area containing a population of less than two thousand. As soon as such area is incorporated, the balance of the community could be annexed. See *W. Va. Code* c. 8, art. 2, §§ 13, 114 (Michie, 1949).

The effect of the decision, when read in conjuncture with the *Chesapeake* case, *supra*, can be summarized as follows: (1) the charter of any city incorporated in West Virginia since 1935 is null and void, if the community had a population in excess of two thousand at the time of incorporation [but see *Albuquerque v. Water Supply Co.*, 24 N.M. 368, 174 Pac. 217 (1918) as to the possi-
bility that such city would have the status of a de facto corporation],
(2) under existing statutes there is no method by which a com-
community with a population in excess of two thousand can be incor-
porated as a unit, (3) assuming the legislature will be able to draft
statutes acceptable to the court's construction of the Home Rule
Amendment, the complex issues which probably must be decided
by the voters of the proposed municipality will make incorporation
extremely difficult.

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TAXATION—CONSTITUTIONALITY OF TAX-REFUND STATUTE.—P
sued the state tax commissioner to recover an overpayment of busi-
ness and occupation taxes as had been authorized by W. Va. Code
C. 11, art. 13, § 8 (Michie, 1949). The circuit court sustained the
state's demurrer to the notice of motion for judgment, and on its
own motion certified the ruling to the Supreme Court of Appeals.
Held, that the legislature exceeded its constitutional powers and
to the extent that the statute undertakes to authorize such action
or suit, it is invalid as violative of W. Va. Const. Art. VI, § 35.

A case with similar facts which reached the same result was
Raible Co. v. State Tax Comm'r, 239 Ala. 41, 194 So. 560 (1940).

It is a well recognized principle of law that a sovereign inde-
pendent state is not subject to suit except by its own consent. Cohen
v. Virginia, 6 Wheat. 264 (U.S. 1821). The consent of the state could
not be given by the West Virginia statute because it was beyond the
power of the legislature to authorize such suits in view of the con-
stitutional provision which reads: "The state of West Virginia shall
never be made defendant in any court of law or equity, except . . .
[certain officers thereof] may be made defendant in any garnish-
The constitutional immunity from suit has been held to cover
boards and commissions, created by the legislature, as agencies of
the state. Mahone v. State Road Comm'n, 99 W. Va. 397, 129 S.E.
320 (1925); Watts v. State Road Comm'n, 117 W. Va. 398, 185 S.E.
520 (1936). An agent of the state is protected from suit by the con-
stitutional prohibition of actions against the state, though the state
is not in name a party, where the interests of the state are directly