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MUNICIPALITIES PROHIBITED FROM ENTERING INTO CONTRACT WITH THE ELECTRIC HOME AND FARM AUTHORITY OF WASHINGTON, D. C.—FINANCIAL CREDIT—DEALERS MAY NOT SELL PRODUCTS UPON DEFERRED PAYMENT PLAN THROUGH MUNICIPALITY ACTING AS A COLLECTION AGENCY—ARTICLE VIII, SECTION 6, CONSTITUTION OF OHIO.

SYLLABUS:

Municipalities in Ohio are prohibited by Article VIII, Section 6 of the Constitution from entering into a contract with the Electric Home and Farm Authority of Washington, D. C., by the terms of which dealers in electrical appliances may sell through such Authority to the consumers of such municipally owned utility their products upon the deferred payment plan and the municipality shall act as collection agency for such Authority in collecting such deferred payments.

COLUMBUS, OHIO, August 2, 1938.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: Your letter of recent date is as follows:

"We are inclosing herewith a letter received from the Director of Law of the City of H., in which it is shown that an agent of the Electric Home and Farm Authority, incorporated under the laws of the District of Columbia, desires to enter into an agreement with the City of H. for the sale of electrical equipment, to be financed through said authority.

The same agent called at the Bureau office and explained the proposition, and left certain literature which we are also inclosing herewith.

As this matter is of general application throughout the State of Ohio, to all municipally owned and operated electrical plants, it is deemed advisable to submit the question for your formal opinion, as follows:

Question: May a city as owner of an electric light plant, contract with the Electric Home and Farm Authority for the sale of electrical equipment appliances to be financed by said Authority but booked and collected by the City through its regular revenue collection department?

We shall appreciate an opinion on this question at your convenience."

Attached to your communication is a letter from the director of law of the city addressed to your Bureau which further clarifies the proposed plan of financing the sale of electrical appliances to consumers and which reads as follows:

"An agent of the Electric Home and Farm Authority, a corporation under the laws of the District of Columbia, called at my office one day last week and desired the city of H., Ohio, who owns and operates an electric light plant, to enter into an agreement with the Electric Home and Farm Authority. The agreement in part provides that retail electric dealers selling to customers electrical equipment finance their operation through the Electric Home and Farm Authority, which in turn desires the city to act as its collection agency, paying said city the sum of one dollar as a booking charge for each account placed with the city for collection and the sum of 12½ cents per month for each collection charge.

The city shall bill the customer with regular monthly service bills, and if installments are unpaid the city will be required to send a delinquent notice to the customer and assign a collector to contact customer with reference to payment of the account. The city is also required to send to the Electric Home and Farm Authority at least once every thirty days a statement of accounts.

The Electric Home and Farm Authority claim that the city will benefit by this method of financing in that there will be a greater sale of electricity.

I advised the commercial agent of said company that in my opinion the city was without authority to enter into such an agreement, but he informed me that there were several towns in Ohio that were operating under this sort of an agreement."

There is also attached to your communication Circular No. 1 of the Electric Home and Farm Authority of Washington, D. C., revised as of March, 1938, explaining in detail the plan for financing the retail purchase of electrical appliances approved by such Electric Home and Farm Authority. It is unnecessary to quote from this circular but it is sufficient to state that it appears that certain private manufacturers submit their products for approval of such Authority in order that they may be eligible for the plan of financing therein outlined. After having secured such approval, dealers may avail themselves of this plan. Appli-

ances which appear to have already been approved as eligible for financing upon a deferred payment plan therein outlined, include refrigerators, ranges, clothes washers and ironers, vacuum cleaners, cream separators, dish washers, milking machines, etc.

The question of the power of a municipality to enter into a contract with the Electric Home and Farm Authority as the medium whereby private corporations may sell their electrical appliances to consumers upon the installment plan under an arrangement whereby the municipality acts as the collection agency for such Authority and in turn for the appliance dealer, immediately suggests a consideration of the inhibition contained in Article VIII, Section 6 of the Constitution. The first sentence of such section reads as follows:

> "No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association: provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies."

The recent decision of the Supreme Court in the case of *Village of Brewster* vs. *Hill,* 128 O. S. 343, is in my judgment dispositive of this question. The syllabus reads:

> "A village owning a distribution system for electric current, contracted with another to supply generating machinery for its system for the sum of $24,960.00, payable partly in cash and partly in deferred installments from the net revenues derived from the plant's operation. The title to the machinery was to remain in the seller until paid for, but the purchase price installments were not to be the general obligation of the village or payable from taxes. Upon its part the village agreed to provide housing for the machinery, to pay $5000.00 in cash upon arrival of the equipment and to pay the deferred installments out of the net revenues in sixty consecutive installments after erection. *Held*: The foregoing transaction between the village and the seller of the machinery contemplates the union of the property of the village with that of the seller in a common pool, from which the net earnings of the joint enterprise would be paid to the seller. To the extent that the village devoted the whole of its own property to secure the seller, to that extent did

it loan its financial credit to and in aid of the seller in violation of Section 6, Article VIII, of the Ohio Constitution."

Particularly pertinent is the language of the court on pages 348, 349 and 350:

"Conceding, however, that the village is acting in a proprietary capacity, yet, in the domain of finance, where its debt incurring or taxing power is involved, the constitution and laws of this state have placed municipalities under legislative control. If either the constitution or the state law has prohibited the execution of contracts such as are here involved, or if the law has provided other methods controlling their execution, the law must be followed.

One of the major, important questions in this case is whether the contract negotiated by the village contravenes any of the provisions of the Ohio constitution; if the village is prohibited by the constitution from acting directly it has no power to act indirectly. *Taylor* vs. *Commissioners of Ross County,* 23 Ohio St., 22. The Court of Appeals in its opinion gave no consideration to Article VIII, Section 6 of the Constitution, which reads as follows: 'No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association * * *.'

The plan adopted by the village and contractor is generally referred to as the 'pledge of receipts plan,' whereby the machinery sold is to be paid entirely from the net revenues of the village plant. Contracts of a similar character have been before the various courts of this country and have given them some tribulation. Among other cases cited by counsel for plaintiffs in error are the following: *Carr* vs. *Fenstermacher,* 119 Neb., 172, 228 N. W., 114; *Long* vs. *City of Cavalier,* 59 N. D., 75, 228 N. W., 819; *Williams* vs. *Kenyon,* 187 Minn., 161, 244 N. W., 558; *Kentucky Utilities Co.* vs. *City of Paris,* 248 Ky., 252, 58 S. W. (2d), 361; *Kelly* vs. *Merry,* 262 N. Y., 151, 186 N. E., 425. Counsel for the defendant in error cite among others the following cases: *Bess* vs. *City of Fayette,* 325 Mo., 75, 28 S. W. (2d), 356; *Schnell* vs. *City of Rock Island,* 232 Ill., 89, 83 N. E., 462; *Hesse* vs. *City of Watertown,* 57 S. D., 325, 232 N. W., 53.

> While in the main the contracts in some of the cases above mentioned are similar to the one in the case at bar, the divergence of opinion arises because of the construction of constitutional and statutory provisions in the various states where the decisions are made. We have been unable to find any case which bottomed its conclusion upon a constitutional provision such as we have in Article VIII, Section 6 of our Constitution. That section has been construed by this court a number of times, and it has uniformly been held that a financial transaction, entered into by a city, whereby it either directly or indirectly attemps to raise money for or loan its credit to or in aid of any company, is constitutionally invalid."

While it may be urged that in the instant case a municipality in the operation of its electric light plant is acting in a proprietary capacity and that the adoption of the proposed plan will further the sale of electricity and involve no expenditures of proceeds of taxation whatsoever, it is nevertheless a fact that in the Brewster case, supra, this same situation prevailed, since, as stated by the court, "machinery sold is to be paid entirely from the net revenues of the village plant." The case is direct authority for the application of the provisions of Article VIII, Section 6 of the Constitution to municipalities in the operation of public utilities. Further in the opinion at page 351, the court referred to the case of *Markley* vs. *Village of Mineral City,* 58 O. S. 430, as follows:

> "In the Markley case, supra, Spear J., on page 438 of his opinion, stated that the interdict of Section 6, Article VIII of the Constitution, 'applies as well to the case of an individual, as to the aggregations named, * * *. It is intended to prevent the union of public and private capital in any enterprise whatever.' "

There is little doubt in my mind but that the operation of the proposed plan would constitute the carrying on of a joint enterprise in the nature of a business partnership between the municipality on the one hand and the Electric Home and Farm Authority combined in interest with private electric appliance dealers on the other. As to the authority of a municipality to enter into any kind of a business partnership with private enterprise, it is pertinent to note the clear statement of the Supreme Court in the case of *Walker* vs. *Cincinnati,* 21 O. S. 14, wherein the court, construing the then provisions of Article VIII, Section 6 of the State Constitution, said at page 54:

> "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State, and individuals or private corporations or associations."

This language was affirmed as declarative of the present purpose of this constitutional limitation in *State, ex rel.* vs. *Cincinnati Street Ry. Co.*, 97 O. S. 283, 303.

No opinion is expressed herein as to the merits or demerits of the proposed plan of furthering the sale of electric appliances. Whatever may be said as to the mutual benefits to result from its adoption, it is not within the province of the courts to determine legal questions of constitutional limitations upon such speculations or prophecies. The language of our Supreme Court is clear upon this matter in *Cincinnati* vs. *Harth*, 101 O. S. 345, at 353:

> "It is earnestly urged, in support of the legislation here under examination, that it was passed in response to public necessities which have grown up out of the emergencies of existing conditions in the country. But, as we said in *State, ex rel. Campbell* vs. *Cincinnati Street Ry. Co., supra,* the office of a judge is jus dicere non jus dare. The duty of the court is to uphold the constitution, even if that act shall temporarily operate to the hindrance of some beneficial result. The people adopted this very provision for the purpose of providing for themselves a safeguard against themselves. The language of the constitution is: 'No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise.' A different conclusion from what we have indicated would open the door for dangerous evasions of constitutional restrictions. The principle upon which such a decision would necessarily rest would be laid hold of for the purpose of forwarding all sorts of enterprises of a similar character, in which public aid is desired."

In view of the foregoing, your inquiry must be answered in the negative.

Respectfully,
HERBERT S. DUFFY,
Attorney General.