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1. MUNICIPALITY BY VOTE OF ELECTORS ADOPTED ONE OF OPTIONAL PLANS OF MUNICIPAL GOVERNMENT—AFTER FIVE YEARS OF OPERATION PLAN MAY BE ABANDONED—MUNICIPALITY MAY RETURN TO FORMER STATUS—NOT REQUIRED TO ADOPT ONE OF OPTIONAL PLANS—PROCEDURE—BALLOT—OTHER SECTIONS 705.01, 705.30, 705.41 RC.

2. INITIATIVE AND REFERENDUM—MAY BE RESORTED TO BY MUNICIPALITY TO ABANDON FORM OF MUNICIPAL ORGANIZATION WHICH IT PREVIOUSLY ADOPTED SECTIONS 705.01, 731.28 THROUGH 731.41 RC.

SYLLABUS:

1. A municipality which has pursuant to Section 705.01, by vote of its electors, chosen to adopt one of the optional plans of municipal government set forth in Sections 705.41 to 705.86, inclusive, of the Revised Code, may after five years operation under such plan abandon such plan and return to its former status under the general provisions of law relating to the organization and government of municipalities; and in so abandoning the form of government so previously chosen, is not required to adopt one of the other optional plans of government set forth in the statutes aforesaid. The procedure for such abandonment may be taken as set forth in Section 705.30, Revised Code, but the form of ballot should be modified so as to eliminate any reference to the adoption of one of such optional plans.

2. The provisions of Sections 731.28 to 731.41, inclusive, of the Revised Code, relating to initiative and referendum may not be resorted to by a municipality for the purpose of abandoning a form of municipal organization which it has previously adopted pursuant to the provisions of Section 705.01, of the Revised Code.

Columbus, Ohio, November 28, 1955

Hon. Harold D. Roth, Prosecuting Attorney
Wyandot County, Upper Sandusky, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have been requested by the Board of Elections of Wyandot County, Ohio, to secure your opinion concerning questions involving the following facts.

"The Village of Carey adopted the city manager plan of government in 1945 by a vote of the people at a general election. No ordinances or other measures were passed setting up this form of government, the Village merely following the provisions of law in Revised Code Sections 705.41 to 705.86.

"Revised Code Section 705.30 provides for the abandonment of three special forms of government provided therein. This section states, 'may abandon such organization and adopt any organization or form of government *provided by such Sections* and designated in the petition.'

"Several questions have arisen in connection with the desire of a group of citizens of the Village of Carey to abandon the city manager form of government and adopt the general system of village government. They have filed a petition requesting an election on the question.

"It appears from Section 705.30 of the Revised Code that if the city manager plan is abandoned then the Village must adopt one of the other two forms of government provided in Sections 705.41 to 705.86. Thus, the first question is: Can the procedure be followed as set up in Section 705.30 of the Revised Code, et seq. to abandon the city manager form of government and adopt the general plan of village government rather than the two other plans set forth in Sections 705.41 to 705.86 of the Revised Code?

"A petition which appears to be set up under the initiative and referendum sections of the Revised Code was filed with the legislative body of the Village. This petition was not filed in accordance with the period required by the Code in that the petition must remain with the legislative body for ten days before being filed with the Board of Elections.

"The question has arisen whether or not the provisions of the initiative and referendum section can be used to secure a vote of the people on the abandonment of this form of village government."

Article XVIII of the Constitution, adopted in 1912, is generally known as the "Home Rule Amendment." It was designed to free cities and villages from the complete domination of the legislature, and except for certain matters reserved to the legislature by express provision, and certain others declared by the courts to be of state wide concern, the amendment has given to municipalities the complete right of self government.

Section 2 of Article XVIII, reads as follows:

> "General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law."

Here there is reserved to the General Assembly the authority to enact general laws for the incorporation and government of municipalities, and this it has done by the enactment of what is generally referred to as the "Municipal Code" embracing most of Title 7 of the Revised Code. As a matter of fact most of the statutes constituting the Municipal Code were in force many years before the adoption of Article XVIII, and it was provided by the schedule to the 1912 amendments that all laws in force on January 1, 1913 not inconsistent with the amendments should continue in force.

Accordingly, the entire body of general municipal laws constitutes what is referred to in your letter as "the general system of municipal government" to which the citizens of the village of Carey now desire to return.

Section 2 supra, proceeds to authorize the legislature to enact additional laws for the government of municipalities adopting the same and provides that such additional laws shall only become operative in any municipality when they have been submitted to the electors and affirmed by a majority of those voting thereon.

Pursuant to the authority thus given, the General Assembly in 1913 enacted Sections 3515-1 to 3515-71, General Code, setting up three model forms of municipal organization known respectively as the "commission plan," the "city manager plan," and the "federal plan." These sections now appear in the Revised Code as Sections 705.01 to 705.92, Revised Code, inclusive.

Section 705.01 provides that whenever ten percent of the electors in any municipal corporation file a petition with the board of elections asking that the question of organization of the municipal corporation under any one of the three plans above referred to, be submitted to the electors of the municipality, such board shall at once certify that fact to the legislative authority of the municipal corporation and the legislative authority shall within thirty days provide for submitting such question at a special election.

Section 705.03, Revised Code, provides for the form of ballot in submitting such proposition. Section 705.04, Revised Code, provides that if approved by a majority of those voting thereon, "such plan * * * shall be the charter of such municipal corporation."

If there had been no further legislation on the subject the question would hardly arise whether the electors of the municipality, having adopted one of such optional plans in the manner aforesaid, could by the same process abandon that plan and return to their original status under the general municipal law. Upon reason, it would appear that there should be no possible doubt of their right to do so. I find in 50 American Jurisprudence, page 525, this statement:

> "There can, in the nature of things, be no vested right in existing law which precludes its repeal. It is therefore, a well established principle that legislative power includes the power to repeal existing laws, as well as the power to enact laws, subject, of course, to constitutional restrictions and inhibitions, such as the prohibition against the extinguishment of vested rights which have been acquired under the former law, or the impairment of the obligations of a contract, or the denial of due process of law. Sometimes, the power to repeal is reserved by statutory provisions of a general nature. This is unnecessary, however, since irrepealable laws cannot be enacted; one legislature cannot abridge the authority of a succeeding legislature to repeal existing laws."

In the case of Thompson v. Marion, 134 Ohio St., page 122, we find an affirmance of that general proposition, and an example of an exception. The legislature had provided by law for the establishment and maintenance of a police pension system, but left it optional with cities to act upon such system. The city of Marion had taken advantage of the law and established a police pension system for that city. Later it attempted to repeal the ordinance establishing the system. The court held, as shown by the second branch of the syllabus:

> "Where, pursuant to and in accordance with the provisions of Sections 4616 to 4631, inclusive, General Code, a municipality

duly found and declared the necessity for the establishment and maintenance of a police relief fund and made fully operative in that city all the provisions of the statute effectuating the establishment, maintenance and administration of such police relief fund, it may not thereafter render entirely inoperative as to such city the provisions of the statute governing the creation and administration of such relief fund and cause the funds raised for such purpose by taxation pursuant to law to be transferred and expended for other and different uses and purposes."

In the opinion at page 126, the court said:

"*The general rule that the power to enact ordinances implies a power of repeal* is inapplicable where the ordinance in question is enacted under a limited authority to do a certain thing in the manner and within the time fixed by the Legislature."

(Emphasis added.)

That case plainly turned on the question of state policy involved in the provisions for establishing pensions for the police force. In the matter of choosing a form of local government for a village, I cannot see that the state has the slightest interest. It is solely a matter of "local self government."

It is true that the choice of a form of government is not a legislative act, as is the passage of an ordinance, but I cannot see any reason why the principle above stated as to the right of repeal should not apply equally to a decision by the electors in exercising an option in choice of its plan of government.

We find, however, that the legislature, in enacting the optional law above referred to, provided in Section 705.30, Revised Code, 3515-69, G. C., as follows:

"Any municipal corporation which has operated for five years under any plan provided in sections 705.41 to 705.86, inclusive, of the Revised Code, *may abandon such organization and adopt any organization or form of government provided by such sections* and designated in the petition, by proceeding as follows: upon the filing with the board of elections of a petition containing the names of not less than ten percent of the electors of such municipal corporation, a special election shall be called by the legislative authority at which the following proposition shall be submitted: 'Shall the municipal corporation of (.....) abandon the (.....) plan and adopt the (name) plan as provided in sections (.....) to (.....), inclusive, of the Revised Code?" (Emphasis added.)

The question at once arises: Is the above provision a grant of a privilege or is it a limitation on the free action of the electors of the municipality? In other words, must we assume that when the legislature has said that the municipality may by vote abandon the choice which it has made, *and* adopt one of the other optional forms of government provided by the legislature, it must use all of that power or have none? If we take that position then it must be admitted that the municipality having once elected to try out one of the optional forms of government, is bound forever by that choice, at least so far as returning to its original status, and can only escape from that organization by adopting one of the other special forms which might be equally unsatisfactory or even more distasteful than the one it has chosen. Is it possible that it is to be forever barred from returning to its original status?

We may take another view of the legislative intent in this statute and conclude that the legislature intended to enable the municipality in a single action both to escape from the one which it had chosen and choose another of the optional forms more to its taste, rather than to have to go through the two processes of first renouncing the one and then by a separate election choosing the other. Thus construed, the statute would appear to be a wholesome enabling act and not an attempt on the part of the legislature to tie the electors of the municipality to an unsatisfactory choice. The statute would not, therefore, be an act of limitation, but rather a grant of a special privilege.

If we adopt this theory and if we are right in the assumption that the body which has a right to legislate or to exercise an option has an inherent right to undo its action, then it would appear that the way would be open for the municipality in question to proceed under Section 705.30, Revised Code, by way of a petition to the board of elections requesting the submission of the single proposition of abandoning the form of government which had theretofore been chosen, thereby returning to its original status.

I am inclined to adopt the latter view as to this situation, and I do not think I am wholly without authority in coming to that conclusion. In the case of Youngstown v. Craver, 127 Ohio St., 195, it appears that the City of Youngstown had proceeded under the constitutional provision contained in Section 7 et seq., of Article XVIII of the Constitution, to elect a charter commission to frame a special charter which had been adopted by a vote of the electors. It appeared further that subsequently,

petitions containing some 5,678 signatures were filed with the city clerk of Youngstown *pursuant to the statutes relating to initiative and referendum.* The question submitted to the Supreme Court was whether or not those statutes could be invoked for the purpose of repealing the charter which had thus been adopted. The court held that the city would have a right to resort to the provisions of Sections 4227-1 to 4227-13, of the General Code, initiative and referendum, for the purpose of abolishing its charter.

While I find myself unable to follow the reasoning of Judge Stevenson in reaching that decision by resort to the initiative and referendum statutes designed solely for the enactment by the people of ordinances or other measures which the council has the power to enact but which it refuses to enact, yet I must accept the fact that the court did decide that the city charter of Youngstown could be repealed by such procedure; and while I would of course have to follow that decision if it pertained to the very point involved in our present inquiry I do not feel compelled to do so since that case arose in connection with a charter adopted pursuant to a direct constitutional grant, while the present question arises out of the construction of a statutory grant, and the exercise of an option granted to the electors of a village. The cases are not in any respect identical.

I cite the Youngstown case only for the purpose of a quotation from the opinion which I consider as sound doctrine, reading as follows:

> "The people of Youngstown would be in a sorry plight if the people of the state of Ohio, by constitutional and legislative juggling, have placed them in a position that they cannot abolish their charter, regardless of how odious the charter form of government has become. If such were true, the people of Youngstown would be required to cajole the Legislature into calling a constitutional convention, or wait until 1952, and even at that time they would be at the mercy of the people of the state.
>
> "It is the policy of our government, federal and state, to at all times enlarge the powers of the people in matters of local self-government, rather than restrict them.
>
> "Section 2 of Article I of the Constitution of the state of Ohio makes this policy manifest in the following words:
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> > 'All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary * * *.'
>
> "It may be argued that this constitutional provision applies to the people of the state as a whole, and not to the people of a

municipal corporation. It is quite true that municipal corporations are creatures of the state, having only such powers as are expressly conferred by the state, together with such incidental powers as are necessary to carry the express powers into execution. The state has seen fit, through constitutional provision and legislative enactment, to give to the people of municipal corporations who see fit to take advantage of such provisions the greatest possible quantum of power of self-government.

"The delegation of the power to adopt a particular form of self-government would prove a shackle to a free people, if the power to abolish it when it became subversive of the purposes of its adoption was withheld.

"When such a question is presented to any court in this country, it is the duty of such court as well to uphold the power of the people to abolish a form of government that has become distasteful to them as to uphold the power to adopt it, if it can be done under the Constitution and the law." (Emphasis added.)

It appears from your letter that the petition which has been filed by the electors is an attempt to comply with the statutory provisions pertaining to an initiative petition. I cannot agree that that procedure can be followed in the case you present. Section 731.28 et seq. of the Revised Code, governs the subject of initiative and referendum. Section 731.28 provides as follows:

"Ordinances and other measures providing for the exercise of any powers of government granted by the constitution or delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. Such initiative petition must contain the signatures of not less than ten per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the municipal corporation.

"When a petition is filed with the city auditor or village clerk, signed by the required number of electors proposing an ordinance or other measure, such auditor or clerk shall, after ten days, certify the petition to the board of elections. The board shall submit such proposed ordinance or measure for the approval or rejection of the electors of the municipal corporation at the next succeeding general election, in any year, occurring subsequent to ninety days after the certifying of such initiative petition to the board of elections. No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the measure in such municipal corporation shall be subject to the veto of the mayor."

Section 731.31 contains the following provision:

"Ordinances proposed by initiative petition and referendums receiving an affirmative majority of the votes cast thereon, shall become effective on the fifth day after the day on which the board of elections certifies the official vote on such question."

Section 731.34, Revised Code, reads in part:

* * *"After a petition has been filed with the city auditor or village clerk it shall be kept open for public inspection for ten days. If, after a petition proposing an ordinance or other measure has been filed with such auditor or clerk, *the proposed ordinance or other measure,* or a substitute for the proposed ordinance or measure approved by such committee, *is passed by the legislative authority* of the municipal corporation, the majority of the committee shall notify the board of elections in writing and such proposed ordinance or measure shall not be submitted to a vote of the electors." * * * (Emphasis added.)

The above quoted provisions of the statutes convince me that it was never intended by the General Assembly to make the initiative procedure anything but a *legislative process,* lodged in the hands of the electors, *to enact such measure and such only* as could be enacted by the council of the municipality. Certainly no power is vested by law in the council of a municipality to pass an ordinance or other measure adopting one of the optional forms of government. That matter was never intended to be the subject of legislative action. It was a power vested solely in the electors. By like reasoning the power to abandon such plan could never be exercised by an ordinance passed by the council of the municipality. That, again, if it exists, is a power vested in the electors, incident to the power to adopt such special plan. Therefore, since the initiative process is designed solely to enable the electors to pass a measure which the council could pass but fails or refuses to do, I must hold that the initiative statutes cannot be resorted to in order to accomplish the process suggested by your inquiry.

I find myself unable to adopt the reasoning of Judge Stevenson that the initiative and referendum statutes may be invoked to accomplish the repeal of a city charter, and prefer to rely on the decision of the Supreme Court in the case of Hill v. Cleveland, 107 Ohio St., 144, which held that the amendment of a city charter authorized by Section 9, of Article XVIII of the Constitution was not the exercise of a legislative power and did not constitute a legislative act. The first syllabus of that case reads in part as follows:

> "The amendment to the home-rule charter of the city of Cleveland, adopted in the election of 1921, *does not constitute a* suspension of law, or *the exercise of the legislative power* of the state; *nor does it constitute a legislative act,* nor an enactment of law of a general nature." (Emphasis added.)

My conclusion, therefore, is that while the village in question has the power to revoke its selection of an optional form of government and return to its original status under the general municipal law, it does not have the right to accomplish that purpose by resorting to the statutes providing for initiative and referendum.

It should be noted that Section 705.30, supra in authorizing a municipality to abandon an optional plan which it has adopted, provides that it may do so only after it has operated under that plan for five years. I do not consider that condition as an unreasonable one; it is manifestly designed to prevent capriciousness on the part of municipalities in changing their form of government, and does not in my opinion infringe on the right of home rule and self government insured to municipalities by the Constitution, as would an attempt by the legislature to wholly throttle their freedom of action.

Accordingly, it is my opinion:

1. A municipality which has pursuant to Section 705.01, by vote of its electors, chosen to adopt one of the optional plans of municipal government set forth in Sections 705.41 to 705.86 inclusive, of the Revised Code, may after five years operation under such plan abandon such plan and return to its former status under the general provisions of law relating to the organization and government of municipalities; and in so abandoning the form of government so previously chosen, is not required to adopt one of the other optional plans of government set forth in the statutes aforesaid. The procedure for such abandonment may be taken as set forth in Section 705.30, Revised Code, but the form of ballot should be modified so as to eliminate any reference to the adoption of one of such optional plans.

2. The provisions of Sections 731.28 to 731.41, inclusive, of the Revised Code, relating to initiative and referendum may not be resorted to by a municipality for the purpose of abandoning a form of municipal organization which it has previously adopted pursuant to the provisions of Section 705.01, of the Revised Code.

Respectfully,
C. WILLIAM O'NEILL
Attorney General