605

MUNICIPAL CORPORATION—WATER SUPPLY SYSTEM—SALE OF WATER TO CORPORATE PURCHASER, DELIVERY AT POINT WITHIN CITY LIMITS; USE WITHIN AND WITHOUT CITY LIMITS—MUNICIPALITY ENGAGED IN SALE AND DELIVERY OF WATER TO AN INHABITANT OF THE CITY "WITHIN MUNICIPALITY" UNDER ART. XVIII, SEC. 6, OHIO CONSTITUTION.

SYLLABUS:

A municipal corporation which owns and operates a public utility for the purpose of supplying water for its own use, for the use of its inhabitants, and for the use of others, and which sells and delivers water at a point within the city on property owned by the corporate purchaser of such water, for use by such purchaser partly within and partly without the territorial limits of the municipality in an industrial plant which is located partly within and partly without such limits, is engaged in the sale and delivery of water for the use of an inhabitant of the city and is supplying such product "within the municipality" within the meaning of Section 6, Article XVIII, Ohio Constitution.

Columbus, Ohio, June 6, 1957

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion reading as follows:

"Your opinion is requested in interpretation of Section 6, Article XVIII, Ohio Constitution, in the situation described below.

"A city which owns and operates a public utility for the purpose of supplying water for its own use, for the use of its inhabitants, and for the use of others, sells and delivers water at a point within the city limits on property owned by the corporate purchaser of the water. Such corporation also owns property outside the city limits which is contiguous to that which it owns in the city; and has constructed on such parcels a substantial industrial plant. Water which is thus sold and delivered is carried by the purchaser, in water lines owned by it, outside the municipal limits and is used there in the operation of its industrial plant.

"The specific question presented to you is whether water thus sold and delivered within the municipality, carried by the purchaser outside such limits, and used by the purchaser outside such limits, should be deemed to be a part of the "product supplied by such utility within the municipality within the meaning of Section 6, Article XVIII, Ohio Constitution."

Section 6, Article XVIII, Ohio Constitution, to which you have referred, reads as follows:

"Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality. (Adopted September 3, 1912.)"

At the outset I may say that I deem the term "inhabitants" as sufficiently broad to comprehend corporations as well as natural persons as that term is used in this constitutional provision. In 21 Words and Phrases, 301, *et seq.,* there are listed numerous cases in which it is held that corporations are regarded as inhabitants. This is particularly true in statutes relating to taxation, and to the enjoyment of the privileges of citizens and residents of municipal corporations. For example, in Railway Co., v. City of Buffalo, 115 N.Y.S., 657, it was held that a railroad company having large property interests located in the city and subject to taxtion therein was an "inhabitant" within the meaning of a statute empowering the city of Buffalo to construct and maintain waterworks to supply the city and its inhabitants with water.

As I understand your query the corporation here in question does own substantial property in the city which is subject to taxation therein, and by the test applied in the city of Buffalo case, it could properly be regarded as an inhabitant of the city.

On this point brief mention should be made of Opinion No. 6223, Opinions of the Attorney General for 1956, page 97, in which it was held that a corporation owning real property adjacent to a municipal corporation and using the same for business purposes was not qualified to petition for annexation of such territory to the municipal corporation. That ruling, however, was based upon peculiar language in Section 709.02, Revised Code, which permitted such a petition to be signed by the "adult freeholders," residing in the territory; and the writer of that opinion, quite properly, I think, held that the use of the term "adult" made it plain that the legislature was referring to natural persons only. The language there involved can, therefore, be readily distinguished from that with which we are here concerned.

We come then to a consideration to the meaning of (1) the words "sell and deliver" and (2) the expression "product supplied by such utility *within* the municipality," as this language is used in Section 6, Article XVIII, *supra*. In the case you describe, it seems quite evident that the sale and delivery takes place at a point within the city limits, and in a technical sense, if no other, it can be said that the product, in this case water, is actually "supplied * * * *within* the municipality."

If it should be suggested that the purpose of this constitutional provision is to authorize a municipality to furnish, through a public utility operated by it, a public utility product for *use within* the municipality, yet it is apparent that nothing in this provision necessarily relates to the *place* of use. Rather, the product must be *"supplied * * * within"* the municipality to "its inhabitants."

Here it should be noted that this "fifty per centum provision" is not, technically, a limitation on a privilege which had theretofore been conferred by the constitution, but rather is language descriptive of the extent of a particular authorization given to municipal corporations in 1912 by the people. This being so, it would seem proper to apply the same rule of construction to this provision as must be applied to the entire section.

In State, *ex rel.* Bailey, v. George, 92 Ohio St., 344, the court held, as disclosed in the second paragraph of the syllabus:

> "Statutes passed pursuant to such home-rule amendment should be liberally construed so as to effect the plain purpose of such amendment."

If a statute passed pursuant to the several home-rule amendments should be literally construed, I see no reason why all such constitutional provisions relating to home-rule should not themselves be given liberal construction.

The fifty per centum provision here under scrutiny appears to have been the subject of judicial consideration in Ohio in only one instance, *i.e.*, Bus Co. v. Village of North Olmsted, 41 Ohio App., 525. The facts in that case are stated in the opinion by Levine, P. J., in pertinent part as follows, pp. 530-531:

> * * * "Since March 1, 1931, the defendant village has been carrying on a municipal bus service which it owns and operates, and which it inaugurated in order to provide transportation service between the village of North Olmsted and the city of Cleveland, and intermediate points. Until January, 1932, its operation was limited to serving those persons who desired to go into or come out of the village of North Olmsted. Shortly after that time, by virtue of a contract with the village of Fairview, it has been rendering a common carrier service not only to persons whose ride originates or begins in the defendant villege, but between all other points on its route except certain points in the city of Cleveland. It is therefore rendering transportation service to the inhabitants of Parkview village and of Fairview village and to those who desire to ride between those villages and the city of Cleveland. For a considerable time the plaintiff has been operating motor transportation service from the westerly limits of Fairview village, pursuant to an agreement made with that village, which has since expired. Plaintiff company has continued to render that same transportation service, and therefore is operating its motorbusses from Fairview village into the city of Cleveland, and, prior to January 4, 1932, was furnishing that service without competition. Since that date the defendant village has established the competing service between the village of Fairview and Cleveland, as well as between the village of Parkview and Cleveland, and between Cleveland and that part of plaintiff's route which operates through North Olmsted. * * *"

It was the contention of the Bus Co., that if the fifty per centum provision were to be deemed applicable to the route mileage, or to the number

of passengers carried within and without the village limits, such provision was being violated by the village. The essence of the court's ruling as to that contention is as follows, pp. 534-535:

> "We are of the opinion that neither the test of mileage nor the number of passengers carried is the proper unit of measurement to be employed in determining 50 per cent of the service. Courts must take judicial notice that modern transportation equipment has in many instances eliminated space; that communities in such proximity to each other, as are North Olmsted Falls and the city of Cleveland, are so closely connected with each other as to be interdependent. Were the court to adopt the standard of mileage in determining the "fifty per centum of the total service," as used in the Constitution, it would impose an arbitrary provision which would destroy the very purpose of the establishment by the village of North Olmsted of the motorbus service, which was principally to provide means of communication between the village of North Olmsted and the city of Cleveland; as it must follow that, if mileage is the test, the village would have no right at all to operate a bus line between its limits and the city of Cleveland.
>
> "We hold that equipment and facilities, plus the human agencies which are reasonably necessary to operate them, constitute public utility service, and that, measured by this test, the village of North Olmsted is operating its transportation service within the powers granted to it by the Constitution of Ohio. In the matter of equipment it only added two additional busses to the other five which were in operation prior to entering into a contract between the village of North Olmsted and the village of Fairview. As to the number of runs we find that, prior to the entering into the contract between the village of North Olmsted and the village of Fairview, the defendant village supplied 25 runs; that since entering into the contract it increased the runs so as to number 35.
>
> "It is our conclusion that the village of North Olmsted has not exceeded its constitutional power either in the establishment of the transportation service or in the manner of operating the same. * * *"

This case, on appeal to the Supreme Court, was dismissed on the motion of the plaintiff-appellant on October 5, 1932.

The language quoted above in which the court held that "equipment and facilities, plus the human agencies which are reasonably necessary to operate them, constitute public utility service," rather strongly suggests that so far as transportation utilities are concerned the service rendered

is measured by capacity to serve rather than by the actual utilization of that service involving the carriage of passengers. It is not my thought, however, that such a capacity test can be applied in the case of other utilities, for it is quite evident, by reference to the language of Section 6, Article XVIII, *supra,* that the framers of the constitution distinguished between (1) the rendition of a "transportation service" and (2) the supplying of a "product." Accordingly, even though it may be thought that a transportation service is rendered when transportation equipment is actually operated a particular number of times within a municipality, whether or not fully utilized, because the utility is supplying the opportunity to use its service, it scarcely follows that the capacity and the willingness to sell a *product* is the measure of a "product *supplied* * * * within the municipality."

Although the point was not mentioned in the North Olmsted decision, it seems fairly certain that the court in that case adopted a liberal construction of the provision here in question, and in that respect the view expressed earlier herein that the several home-rule provisions in the constitution should be given a liberal interpretation, is in complete harmony with the decision in that case.

I do not mean to suggest, however, that the technical delivery of the product of a public utility within the territorial limits of a municipality can be used as a subterfuge so as to justify the sale, free of the restrictive terms of the fifty per centum provision here involved, to a purchaser for carriage and use outside the municipality in a situation where no claim can be made that the purchaser is a bonafide "inhabitant" of such municipality. Thus, in Western New York Water Co., v. City of Buffalo, 208 N.Y.S., 387, it was held that a corporation whose plant was located entirely outside the city limits was not an inhabitant within the meaning of the city charter so as to authorize the city to furnish it with water delivered to a vacant lot owned by the corporation within the city limits, and piped outside the city to its plant, even though the corporation had an office in the city and many of its employees and officers lived therein. This case was reversed (242 N.Y., 202) on a point not here relevant.

In the instant case, however, I understand you to indicate that the corporation concerned has constructed a substantial industrial plant which is partly within and partly without the city and that there is a substantial use within the city of the water supplied to such corporation. In this

situation it is my view that since the water is actually supplied within the municipality, because the constitutional provision in question makes no reference to the place of use, and because of the necessity of according liberal interpretation to the constitutional provision, we may properly regard the corporation described in your inquiry as an inhabitant of the municipality to whom a public utility product is supplied "within the municipality" within the meaning of Section 6, Article XVIII, Ohio Constitution.

Accordingly, in specific answer to your inquiry, it is my opinion that a municipal corporation which owns and operates a public utility for the purpose of supplying water for its own use, for the use of its inhabitants, and for the use of others, and which sells and delivers water at a point within the city on property owned by the corporate purchaser of such water, for use by such purchaser partly within and partly without the territorial limits of the municipality in an industrial plant which is located partly within and partly without such limits, is engaged in the sale and delivery of water for the use of an inhabitant of the city and is supplying such product "within the municipality" within the meaning of Section 6, Article XVIII, Ohio Constitution.

Respectfully,
WILLIAM SAXBE
Attorney General