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CHARTER PROVISIONS—VILLAGE OF WESTERVILLE HAS NO OFFICER WHO CAN FUNCTION AS MAYOR.

SYLLABUS:

In view of the provisions of the charter for the village of Westerville and the unconstitutionality of Section 4544 G. C., as found by the Supreme Court in the case of Hilton v The State, decided June 12, 1923, the village of Westerville has no officer who can function as a magistrate or mayor.

COLUMBUS, OHIO, September 19, 1923.

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

GENTLEMEN:—In your recent communication you request my written opinion as follows:

> "In Case No. 17890, decided June 12, 1923 (as yet unreported), the Supreme Court held that Section 4544 G. C., was unconstitutional. This section provides that in villages the council may elect a justice of the peace to perform the judicial functions of the village mayor. Since this section has been declared unconstitutional the only person who exercises judicial functions in a village is the mayor. The village of Westerville, Ohio, is operating under the commission-manager plan of government by virtue of a charter (copy of which is herewith enclosed), and this charter does not make any provision for a mayor nor does it provide for a judicial officer of any sort. In the absence of any such provision in this charter, the council under section 4544 G. C., elected a local justice of the peace to perform the mayor's judicial functions.
>
> *Question:* Since Section 4544 G. C. is unconstitutional and the justice of the peace can no longer act as police justice of the village, what officer should perform the judicial functions vested in the village mayor by the statutes?"

In a supplemental letter you call attention to the provisions of Section 3515-23 of the General Code which provides substantially the same as Section 4544, to which you refer.

The case to which you refer was that of Hilton vs. The State, being No. 690 and decided June 12, 1923. In this case Hilton was a justice of the peace duly elected and qualified for the township in which the village of Terrace Park is situated. While holding such office he was appointed Police Justice for said village under the provisions of Section 4544 G. C., which said section provides:

> "Upon the recommendation of the mayor, the council may, by an affirmative vote of two-thirds of all the members elected, appoint a justice of the peace, resident of the corporation, or if there is no such justice of the peace, another suitable person resident of the corporation or a justice of the peace for the township in which such corporation is situated, police justice, who shall, during the term of office of such mayor, unless removed on suggestion of such mayor by a two-thirds vote of all the members of the council, have concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation with full power to hear and determine them, and shall have the same powers, perform the same duties, and be subject to the same responsibilities in all such cases as are prescribed by law, to be performed by and

are conferred upon the mayors of such corporations. Any person so appointed police justice, other than a justice of the peace, shall take an oath of office and give bond in such sum for the faithful performance of his duties as the council may require."

After consideration the Supreme Court held as disclosed by the syllabus of said opinion that:

"The provisions of section 4544 G. C. (98 O. L. 159), to the extent of conferring power upon the council of a municipality to appoint a police justice, are unconstitutional and therefore void."

An examination of the opinion clearly indicates that the determination was reached that such an office is a judicial office and can only be established in pursuance to the provisions of section 15 of article IV of the Ohio Constitution, which provides for the establishment of courts not specifically created by said constitution and which reads as follows:

"Laws may be passed to increase or diminish the number of judges of the supreme court, to increase beyond one, or diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided."

Further, it is clear that the court's conclusion was based upon the provisions of section 10 of article IV of the Ohio Constitution, which reads:

"All judges, other than those provided for in this constitution, shall be elected, by the electors of the judicial district for which they may be created, but not for a longer term of office than five years."

In the course of said opinion Judge Jones in substance stated that not only the expressed language of the judicial article of the Constitution prohibited the appointment of such a court, but such a procedure was against the spirit of the Constitution.

Applying the principles and reasoning of the Hilton Case, supra, to the facts as stated in the case under consideration the conclusion is irresistible that the council of the village of Westerville was without power to legally appoint a police justice. Analogically it further follows that what was said by the court in reference to the unconstitutionality of section 4544 G. C., would be equally applicable to section 3515-23, which you mention. In other words, if section 4544 is unconstitutional it would be impossible to legally accomplish the same object by a different section of the statute and said section 3515-23 must necessarily fall for the same reason that section 4544 was held to be void.

In specific answer to your inquiry you are advised that in view of the said decision of the Supreme Court there is now in my opinion no officer existing in the village of Westerville authorized and empowered to exercise the judicial functions. I am reluctant to reach this conclusion for the reason that this determination leaves no method open for the enforcement of the ordinances of said village. However, the plain provisions of the Constitution as interpreted by the highest court of the state must necessarily control.

Section 24 of article VI of section 3515-1 of the General Code, which relates to the plans of municipal government provides that in the establishment of a charter

city when an office has been abolished the duties of such abolished office as established under the old form of government should be performed by the new officer whose duties and powers correspond with those of the abolished office.

In view of these provisions and the charter of the village of Westerville it is probable that the manager could exercise the jurisdiction of a mayor if it were not for the fact that he is not elected but appointed by council. Therefore, it is impossible for such manager to exercise such authority and I find no such an officer provided for in the charter.

In the case of State ex rel v. Culbertson, 30 O. C. A. 113, it was indicated by the Court of Appeals that a charter city had power to establish a court for the purpose of local self-government.

In an opinion of the Attorney-General reported in the reports for the year 1919 at 372 it was held:

> The power to establish a municipal court having the judicial powers and jurisdiction of mayors, is vested in the general assembly by article IV of the constitution and not in municipalities under article XVIII."

However, it was further pointed out in said opinion that:

> It might be contended with some plausibility that municipalities possess the power under article XVIII to establish local tribunals with jurisdiction limited to municipal offenses only, thereby excluding state cases."

In an opinion rendered by the Attorney-General reported for the year 1922, page 1077 of the report for said year in which the case of State ex rel v. Culbertson supra, was discussed, it was further indicated that probably a charter city could provide for a municipal court in the charter, the jurisdiction of which would necessarily be limited to ordinances cases. However, in the case of *Cleveland* v. *Stevens*, decided by the Cuyahoga Court of Appeals, September 18, 1922, it was held that a municipality by its charter could provide for the officer to perform the judicial functions of a mayor's court. This decision was based upon the Zanesville case, supra, and *Ida* v. *State*, 95 O. S. 224. The conclusion of this case in substance is that the court still exists as established by general law, and the charter simply designates who shall perform such judicial functions given to a mayor and if he is elected as required by the constitution he can properly function.

However, it is unnecessary to pass upon that particular proposition at this time for the reason that no such attempt has been made by said village. Of course, relief unquestionably can be granted by the legislature by providing for a municipal court. In the meantime the county and township officials, of course, can function with reference to the violation of the state laws which undoubtedly covers in most instances the same subjects as the municipal ordinance covers.

In view of this situation it is probable that such village will not necessarily be seriously handicapped on account of such loss of jurisdiction.

Respectfully,
C. C. CRABBE,
Attorney-General.