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Municipal Corporations—Home Rule Charter—Validity of Charter Amendment Authorizing Penalty of Imprisonment at Hard Labor for Violation of Municipal Ordinance

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MUNICIPAL CORPORATIONS—HOME RULE CHARTER—VALIDITY OF CHARTER AMENDMENT AUTHORIZING PENALTY OF IMPRISONMENT AT HARD LABOR FOR VIOLATION OF MUNICIPAL ORDINANCE

The home rule charter of the city of Lincoln, Nebraska at one time provided:

In addition to the powers hereinbefore enumerated, the city shall have power by ordinances:

> 50. To make all such ordinances, by laws, rules and regulations not inconsistent with the laws of the state as may be expedient, in addition to the special powers in this article enumerated, to maintain the peace, good government, and welfare of the city, its trade, commerce and manufactures, and to enforce all ordinances *by imposing forfeitures, and by inflicting fines and penalties for the violation thereof* not exceeding one hundred dollars for any one offense, recoverable with costs, and in default of payment, to provide for confinement in the city prison or county jail, with or without hard labor upon the city streets or elsewhere, for the benefit of the city, until said judgment and costs are paid.[1]

On June 15, 1954 the charter was amended by striking the italicized portion of the charter and substituting instead:

> . . . providing for imprisonment of those convicted of violations thereof *at hard labor* for a period of not to exceed six months and to impose forfeitures, fines and penalties . . .[2]

This amendment raises the question whether a city has power, under a home rule charter, to enforce ordinances by providing for imprisonment at hard labor other than upon a default in payment of a fine. Determination of this question is dependent upon two other questions. First, can the power to create a crime be delegated to a city under a home rule charter, and, if the power can be delegated, has it been delegated to the city of Lincoln?

I. CAN THE POWER TO CREATE A CRIME BE DELEGATED TO A HOME RULE CITY IN NEBRASKA?

Prosecutions under a municipal ordinance are generally regarded as *civil actions* for the recovery of a fine.[3] Imprisonment upon default in payment of such a fine is not considered imprisonment for debt, but only as a means of enforcing the order of the

[1] Lincoln City Charter, Art. II, § 2, ¶ 50 (1949). Emphasis supplied.

[2] Not yet in published form, but on file at the office of the Lincoln city clerk. Emphasis supplied.

[3] Peterson v. State, 79 Neb. 132, 112 N.W. 306 (1907); 9 McQuillan, Municipal Corporations § 27.06 (3d ed. 1949).

court.[4] The statutory charters of all classes of cities, except the metropolitan class, provide authority to impose imprisonment for violation of an ordinance only upon default in payment of a fine.[5]

The reason for the "civil action" doctrine is exemplified by the Wisconsin Supreme Court in *State ex rel Keefe v. Schmiege*.[6] An ordinance declared certain conduct to be a misdemeanor. The court argued that a misdemeanor is a crime, and that creation of a crime is a soveriegn, non-delegable power of the state. Regardless of whether or not the Wisconsin court's position that a misdemeanor is necessarily a crime is sound reasoning[7], the case illustrates the theory underlying the doctrine that a prosecution for violation of an ordinance is a civil action.

In the same case, Wisconsin adopted the position that the imposition of imprisonment, without a default in payment of a fine, for the violation of an ordinance was unconstitutional as violating a provision of the Wisconsin Constitution prohibiting in-

[4] Neb. Const. Art. I, § 20, "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud." See State ex rel. Keefe v. Schmiege, 251 Wis. 79, 28 N.W.2d 345, 174 A.L.R. 1338 (1947).

[5] Neb. Rev. Stat. § 14-102(25) (metropolitan cities); §§ 15-260, 263 (primary cities); § 16-246 (first class cities); § 17-207 (villages); § 17-505 (villages and second class cities) (Reissue 1954). Neb. Rev. Stat. § 18-206 (Reissue 1954), however, provides, "If the defendant is found guilty, the police magistrate shall declare the punishment which, in cases arising under the ordinances of the city or village, shall be by fine or imprisonment, or both, and shall render judgment according to law. It shall be a part of the judgment that the defendant shall stand committed until the judgment be complied with, and all fines and costs are paid. It shall be lawful to further provide as part of the judgment, that until such judgment is complied with and such fines and costs are paid, that the defendant be required to work out said fines and costs upon the public streets, or at any other place that may be provided, at the rate of two dollars per day for each day the defendant shall actually work." An interpretation of this law to mean that in rendering "judgment according to law", the magistrate could impose only such penalty as is provided by the ordinance, would avoid a conflict with the other statutes cited.

[6] 251 Wis. 79, 28 N.W.2d 345 (1947).

[7] The court cites State v. Slowe, 230 Wis. 406, 284 N.W. 4 (1939) for the proposition that a misdemeanor is a crime. The rationale of the case does not indicate that an act is made a crime merely because it is called a misdemeanor. Killing of deer, which was a misdemeanor by statute, was declared to be a crime under a definition of "crime" which included "... offenses against the lives and persons of individuals; offenses against property; offenses against public justice; offenses against public policy ...." It would seem that it is the *substance* of an act which is a violation of a law or ordinance, rather than the name or designation given to the violation.

voluntary servitude except as punishment for a crime.[8] The court did not cite any authority for this position. There is scant authority on the point, but what there is reveals that more than mere imprisonment is required to constitute involuntary servitude. Imprisonment "at hard labor" is regarded as involuntary servitude.[9] Such punishment upon default in payment of a fine would be voluntary, rather than involuntary, servitude, since the defendant has the alternative of paying the fine. It can be generalized that imprisonment at hard labor which does constitute involuntary servitude can be imposed only as punishment for crime.

The Lincoln charter amendment authorizes the city to enact ordinances, the violation of which is punishable by a form of involuntary servitude. The charter amendment must grant the city power to create a crime. To argue that the charter amendment is therefore unconstitutional because a prosecution under a city ordinance is a civil instead of a criminal action is to beg the question. Whether such an action is civil or criminal depends upon whether a city may constitutionally exercise the power to create a crime.

The Wisconsin court held that creation of a crime is a nondelegable power of the legislature. It is submitted that this delegation should not be unconstitutional.[10] There is no policy reason for the rule. It would seem that a city is just as capable of creating a crime as the legislature.

However, the delegation to a city under a home rule charter in Nebraska can easily be distinguished from the delegation in the *Schmiege* case. In Nebraska the delegation is from the state constitution, rather than from the state legislature. The Nebraska Constitution provides:

[8] U.S. Const. Amend, XIII; Neb. Const. Art. I, § 2. Each contains an almost identical prohibition against involuntary servitude.

[9] Flannagan v. Jepson, 177 Iowa 393, 158 N.W. 641 (1916). A statute imposing imprisonment at hard labor for contempt of court was held invalid as involuntary servitude, arguing that contempt of court was "in the nature of but not a crime." The court pointed out that "Imprisonment is not involuntary servitude. Labor enforced as a punishment is involuntary servitude . . . [therefore] it follows of necessity that the sentence pronounced upon the petitioner and the statutory provision which authorizes it are both invalid . . .." See also State ex rel. Erickson v. West, 42 Minn 147, 43 N.W. 845 (1889).

[10] See St. Louis v. Western Union Telegraph Co, 149 U.S. 465, 467 (1892); 2 McQuillan, Municipal Corporations § 10.13 (3d ed. 1949).

> Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of the state . . .[11]

It cannot then be argued that the delegation of the power to create a crime to a city under a home rule charter is unconstitutional, if the delegation is from the constitution itself.

II. IS THE POWER TO CREATE A CRIME ACTUALLY DELEGATED?

The scope of the powers delegated to a home rule city is limited by the words "for its own government, consistent with and subject to the constitution and laws of the state." In *Axberg v. City of Lincoln*[12] this language was interpreted to mean that a city governed under such a charter could:

> . . . provide for the exercise of every power connected with the proper and efficient government of the municipality where the legislature has not entered the field. Where the legislature has enacted a law affecting municipal affairs, but which is also of state concern, the law takes precedence over any municipal action under the home rule charter. But where the legislative act deals with a strictly local municipal concern, it can have no application to a city which has adopted a home rule charter.

The test to be applied, then, in determining whether power over a particular matter has been delegated to a city which has adopted a home rule charter is whether the subject matter is of strictly local municipal concern, or of state-wide concern. If a statute is in conflict with a home rule charter or charter amendment, the statute will take precedence over the charter only if the subject matter of the statute is of state-wide concern. There can be no doubt that the Lincoln charter amendment is in conflict with the state statutes. The statutes applicable to cities of the primary class provide for imprisonment only upon default in payment of fines[13] while Lincoln's charter amendment provides for imprisonment at hard labor regardless of a default in payment of fines.

It should be noted that the application of the test of state-wide concern may be qualified to some extent by the manner in which the home rule charter is adopted. Article XI, Section 5

[11] Neb. Const. Art XI, § 2.

[12] 141 Neb. 55, 58, 2 N.W.2d 613 (1942). See also Eppley Hotels Co. v. City of Lincoln, 133 Neb. 550, 276 N.W. 196 (1937); Schroeder v. Zehrung, 108 Neb. 573, 188 N.W. 237; Axelrod, Home Rule, 30 Neb. L. Rev. 224 (1950).

[13] Neb. Rev. Stat. §§ 15-260, 15-263 (Reissue 1954).

of the Nebraska Constitution provides a means whereby a city with a population of over 100,000 may adopt its "existing" charter as its home rule charter and may thereafter amend it "subject to the constitution and laws of the state." In *Munch v. Tusa*[14] and in *Sullivan v. Omaha*[15] the court stated:

> . . . even though a subsequent amendment to the home rule charter may involve a matter of state-wide concern, the field will not be deemed to have been occupied by legislative act unless such act came into existence after the adoption of the home rule charter.

The reasoning of these cases is that the charter of Omaha previous to the adoption of their home rule charter was the "legislative" charter, i.e., the statutes governing cities of the metropolitan class. To require the Omaha home rule charter to be subject to the "legislative" charter would vitiate the power of amendment granted by the constitution. Therefore the city was free to amend its charter without regard to the statutory charter as "laws of the state." This doctrine could not, of course, be applied to laws not a part of the "existing charter" which means that any changes made in the "legislative" charter by the legislature after the adoption of the home rule charter would control as to the home rule charter if their subject matter was of state-wide concern.

The law of these cases is not applicable to Lincoln, which adopted its charter pursuant to Article XI, Section 2 of the constitution. Lincoln's charter was framed by a charter convention. Language in Section 2 that a charter so adopted shall ". . . supersede any existing charter and all amendments thereof. . ." apparently has reference to any previous *home rule* charter. As illustrated by the *Axberg* case, the test of state-wide concern continues to be the test applied to amendments of charters adopted under Article XI, section 2.

CONCLUSION

In view of the position taken by the Nebraska Supreme Court that there is ". . . no sure test which will enable us to distinguish between matters of strictly municipal concern of those of state concern," a prediction as to whether or not the Lincoln charter amendment would be upheld as valid must be necessity be a guess.[16] There is reason to believe, however, that it would be struck down. In the *Axberg* case the court, in considering this problem in relation to firemen's pensions, said:

[14] 140 Neb. 457, 300 N.W. 385 (1941).
[15] 146 Neb. 297, 298, 19 N.W.2d 510 (1945).
[16] Axberg v. City of Lincoln, 141 Neb. 55, 2 N.W.2d 613 (1942).

> Police and fire protection are essential to the administration of state government. The state must remain soveriegn in all such affairs else its authorities cannot protect rights assured to its citizens by its Constitution. These are fundamental reasons why police, fire and health undertakings are essentially attributes of state soveriegnty and matters of state-wide concern. Preservation of order, enforcement of law, protection of life and property, and the suppression of crime are matters of state-wide concern.[17]

The control of the judiciary in the exercise of its functions is of no less importance to the state in the preservation of order, enforcement of law, and the suppression of crime than is the matter of pensions to be paid to firemen. In addition, we are here dealing with the manner in which individuals are deprived of their liberty. Certainly this matter is of as much importance to the state as the manner in which persons are deprived of their property.

It is therefore submitted that the power of a home rule city to create a crime by imposing imprisonment at hard labor is a matter of state-wide concern, and that the Lincoln charter amendment is invalid as conflicting with the laws of the state.[18]

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[17] Ibid.

[18] If the subject of this amendment is not a matter of statewide concern, and the amendment is held valid, a prosecution for violation of an ordinance for which imprisonment at hard labor is imposed must be tried under criminal procedure. Lincoln city authorities indicated that no change would result in their prosecutions for ordinance violations, since it is apparently the practice of Lincoln judges to require a criminal burden of proof. The power of the city to appeal such cases, however, might be seriously affected.