BEXAR COUNTY v. LINDEN. (No. 3213.)

(Supreme Court of Texas. April 14, 1920.)

1. States ⇐119 — Act requiring payment to county of excess fees not grant to "county" as "municipal corporation."

Rev. St. 1911, art. 3889, requiring district attorneys to pay into the county treasury the excess fees of their office, *held* not violative of Const. art. 3, § 51, as amounting to grant of public money to counties of the state as municipal corporations; a "county" being an agency of the state in the performance of its functions, while a "municipal corporation" is created chiefly to administer local and internal affairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County; Municipal Corporation.]

2. District and prosecuting attorneys ⇐5(1) —Amendment not relieving from law fixing maximum compensation.

Laws 1913, c. 121 (Vernon's Sayles' Ann. Civ. St. 1914, art. 3881), amending Rev. St. 1911, art. 3881, in view of other distinct provisions, *held* not to relieve district attorneys from operation of the law fixing maximum compensation.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by W. C. Linden against Bexar County. From judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which affirmed (205 S. W. 478), and defendant brings error. Judgments of the Court of Civil Appeals and trial court reversed, and cause remanded.

Lewright & Douglas, of San Antonio, for plaintiff in error.

W. C. Linden and J. H. H. Graham, both of San Antonio, for defendant in error.

PHILLIPS, C. J. The case concerns the constitutionality of the statute (Article 3889—Section 11, Act of 1897, as amended) requiring District Attorneys to pay into the county treasury what are termed the excess fees of their office.

The suit was one by W. C. Linden to recover an amount of such fees paid by him as District Attorney into the county treasury of Bexar County, and in which, by cross-action, Bexar County sought recovery against him for an amount claimed by it to be still due upon such account. Mr. Linden prevailed in the trial court. Upon Bexar County's appeal, the honorable Court of Civil Appeals for the Fourth District held the statute unconstitutional as amounting to a grant of public money to counties of the State as municipal corporations, within the inhibition of Section 51 of Article 3 of the Constitution. Under this holding the judgment, after being reformed in some particulars, was affirmed.

[1] It was within the Legislature's power, in our opinion, to provide for the disposition of the excess fees of District Attorneys as is done by the statute. We do not regard the disposition made as in any sense a grant of public money. The statute is in our view, therefore, a valid enactment.

This holding is based upon the relation which the counties of the State bear to the sovereignty of the State; upon their character as mere political subdivisions of the State; created for the convenience of the people and for the purposes of local government, but for the exercise of essentially State powers as distinguished from municipal powers; and, with their conferred powers having the nature of duties rather than privileges, existing as but agencies of the State for the effective discharge through local officers of the governmental obligations of the State.

The use of the counties of the State as a means of government is a use by the State and for the State as a sovereignty. The effect of the statute, in association with other provisions of law is to set apart the excess fees of District Attorneys and other officials as State funds for the governmental purposes of the State with whose execution the counties, as instrumentalities of the State, are charged. Such a dedication is in no true sense a grant of public money. It is but an appropriation of funds of the State for the uses of the State. It is therefore a constitutional use, having no character of a bounty or gratuity.

No feature of the Constitution is more marked than its vigilance for the protection of the public funds and the public credit against misuse. This is exemplified by numerous provisions in the instrument. In general, where the inhibitions of these provisions are found with respect to municipal corporations in terms, they are laid in language so broad as to include all classes of public or political corporations and therefore equally apply to counties.

For illustration, Section 50 of Article 3 denies to the Legislature any power to give or lend, or to authorize the giving or lending, of the credit of the State in aid of or to any person, association "or corporation, whether municipal or other," or to pledge the credit of the State in any manner whatsoever for the payment of the liabilities, present or prospective, of any individual, association of individuals, "municipal or other corporation whatsoever."

Section 52 of the same article prohibits the Legislature from authorizing "any county, city, town or other political corporation or subdivision of the State" to lend its credit or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, etc., except for the

certain public improvements to which the proviso of the section relates and as in that part of the section provided.

Section 53 of the same article restrains the Legislature from authorizing "any county or municipal authority" to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered, or a contract has been entered into and performed in whole or in part; and from paying or authorizing the payment of any claims created against "any county or municipality" of the State, under any agreement or contract made without authority of law.

Section 55 of the same article declares that the Legislature shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to the State, or to "any county or other municipal corporation" in the State.

Section 3 of Article 11 denies to any "county, city or other municipal corporation" the power to become subscribers to the capital of any private corporation or association, or to make any appropriation or donation thereto, or in anywise loan its credit—excepting obligations undertaken pursuant to law prior to the Constitution's adoption.

Section 51 of article 3,—except for aiding, as stipulated in its proviso, indigent and disabled Confederate soldiers and sailors; indigent and disabled soldiers who served under special laws of the State in organizations for the protection of the frontier during the war between the States, or in the State militia during that war; their widows; and for the establishment of a home for such soldiers and sailors, their wives and widows and women who aided in the Confederacy,—prohibits the Legislature from making any grant or authorizing the making of any grant of public money to any individual, association of individuals, "municipal or other corporation whatsoever."

This section recognizes only soldiers and sailors of the Confederacy, their wives and widows, and women who aided in the Confederacy, as having any claim upon the bounty of the State. Its evident purpose is to deny to the Legislature any power to grant or to authorize the grant of public money to all others, absolutely.

The giving away of public money, its application to other than strictly governmental purposes, is what the provision is intended to guard against. The prohibition is a positive and absolute one except as to a distinctive class to whom the State is under a sacred obligation. Not only are individuals, associations of individuals and private corporations within its spirit, but all kinds of public or political corporations, as well, whether strictly municipal or not. It therefore applies to counties, whether considered as public corporations or only quasi corporations. The similar restraints upon the use of public funds and the public credit applied to counties by these other provisions of the Constitution practically demonstrate this to be true.

If, therefore, the effect of the statute is to bestow funds of the State upon counties of the State as a gratuity, or for uses not related to the State's governmental duties, it would be invalid. On the other hand, if its effect is to but apply such funds to the uses of the State as a government, there can be no reason for holding it void.

It is accordingly important to consider the nature of counties under our form of government, their relationship to the State, their functions and their uses, in order to ascertain whether the powers they exercise in a governmental capacity are other than State powers, and whether their use of such State funds as are constituted by these excess fees for the purposes to which they may legally apply them, is any other than a use for the State as a government, for which purpose the counties are only availed of as a means.

The State government must be carried on by means of certain agencies or instrumentalities. It cannot be all conducted by purely State officials located at the capital. To bring the government close to the people and to maintain barriers against the centralization of power, we therefore have county government, a species of precinct government, and municipal government. They all reflect the Anglo-Saxon instinct for local self-government, and exist to preserve that sturdy and wholesome principle.

The municipal government is a government of distinct kind. Its origin and history very plainly reveal this. The term comes from the Roman law, under which the common division of civic communities established by the Roman government was three—the prefectures, the colonies and the municipia—the free towns, having and retaining their laws, their liberties and their magistrates. Their importance as unique features of the Roman Empire led an eminent historian to observe that "the history of the conquest of the world by Rome is the history of the conquest and foundation of a vast number of cities. In the Roman world in Europe there was an almost exclusive preponderance of cities and an absence of country populations and dwellings,"—a condition, it may be added, which had much to do with its decay. The conception of the municipal towns was—

> "A community of which the citizens were members of the whole nation, all possessing the same rights and subject to the same burdens, but retaining the administration of law and government in all local matters which concerned not the nation at large."

This, in substance, is a correct description of municipal organizations in this country. With us, municipalities are in an important sense agencies of the State, and in them repose a certain part of the political power of the State, but their purpose, chiefly, it is important to remember, is to regulate and administer the local and internal affairs of the particular community. Their main and essential purpose, in a word, is the advantage which will ensue from them to their inhabitants. As Judge Dillon has put it:

"The primary and fundamental idea of a municipal corporation is an institution to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated, or at all events *not common to the State or people at large.*"

The affairs of a municipality are municipal affairs, their concerns are municipal—those merely of the community, and the powers they exercise are municipal powers.

This is not true of counties. They are essentially instrumentalities of the State. They are the means whereby the powers of the State are exerted through a form and agency of local government for the performance of those obligations which the State owes the people at large. They are created by the sovereign will without any special regard to the will of those who reside within their limits. Their chief purpose is to make effective the civil administration of the State government. The policy which they execute is the general policy of the State. Through them the powers of government operate upon the people and are controlled by the people. They are made use of by the State for the collection of taxes, for the diffusion of education, for the construction and maintenance of public highways, and for the care of the poor. All of these things are matters of State, as distinguished from municipal, concern. They intimately affect all the people. The counties are availed of as efficient and convenient means for the discharge of the State's duty in their regard to all the people.

A principal State function which they perform, in whose performance they exercise essentially State powers, is the administration of the State's justice. Their local courts exist for no other purpose. Their local constabulary is to keep the State's peace. They represent the State's power in the different duties with which they are charged, and in the execution of those duties they exercise the State's power for the common welfare.

They possess some corporate attributes, but they are, at best, only quasi corporations. 1 Dillon, § 37; Heigel v. Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63. Primarily, they are political subdivisions—agencies for purely governmental administration. They are endowed with corporate character only to better enable them to perform their public duties as auxiliaries of the State.

In Commissioners of Hamilton County v. Mighels, 7 Ohio St. 109, a leading case upon the subject, the nature of the relation of counties to the State is thus stated:

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are, in fact, but a branch of the general administration of that policy."

In City of Sherman v. Shobe, 94 Tex. 129, 58 S. W. 949, 86 Am. St. Rep. 825, their character is thus described:

"Counties are commonly designated quasi corporations for the reason that, being but political subdivisions of the State and organized purely for the purposes of government, they differ essentially not only from private corporations but also from such public corporations as towns and cities, which are voluntary and are established largely for the private interests of their inhabitants."

While a municipal corporation proper is liable for any injury resulting from neglect to keep its streets in repair (City of Galveston v. Posnainsky, 62 Tex. 118, 50 Am. Rep. 519), a county is not liable for an injury caused by a defective public structure, such as a bridge. Heigel v. Wichita County, 84 Tex. 392, 19 S. W. 562, 31 Am. St. Rep. 63. This distinction in respect to such liability rests upon the difference between the character of a municipal corporation and that of a county—the difference in their relationship to the State.

In Judge Stayton's discussion in City of Galveston v. Posnainsky this difference is pointed out with the force and clearness characteristic of his opinions. It is there emphasized that counties are but "an agency of the State through which it can most conveniently and effectively discharge the *duties* which the *State, as an organized government,* assumes to *every person,* and by which it can best promote the welfare of *all*"; and that the State makes use of them "to exercise powers not strictly municipal, but in fact *State* powers, exercised for the *State* through the local officers within prescribed territorial limits."

Since the duties which the counties perform are State duties and the powers they exercise are State powers, an apportionment to them of State funds, as the payment into

their treasuries of the excess fees of District Attorneys under this statute, for the carrying out of those duties, is manifestly not a grant of public money. There is nothing of the bestowal of a bounty or gratuity about it. It is but a method adopted by the State for the discharge of an obligation of the State—the obligation to provide the people with the facilities of civil government through the counties as effective agencies for the purpose. The counties receiving such excess fees can appropriate them to none other than strictly governmental purposes, from which, presumably, the State as a sovereignty, derives the benefit.

Those counties to whose uses the excess fees may be applied, may derive a certain advantage over those to which none are paid, and over others in the proportion of such payments. But the statute is not to be held invalid for such lack of uniformity in the distribution of the excess, even if the defendant in error were in position to raise that question in this suit. It would doubtless be found that the counties receiving the larger amounts of the excess fees, furnish through the taxation of their inhabitants a like proportion of the fund from which the fees are originally paid. The payment of the excess into the treasury of the county where the excess occurs, is probably as fair a method for its distribution as the Legislature could devise.

[2] The Court of Civil Appeals in our opinion correctly held that the change made in Article 3881 by the Amendment of 1913 did not, in view of other distinct provisions of the statute, relieve District Attorneys from the operation of the law fixing the maximum of their compensation.

The judgments of the Court of Civil Appeals and the District Court are reversed and the cause remanded to the District Court.

COWELL et al. v. AYERS et al. (No. 3366.)

(Supreme Court of Texas. April 14, 1920.)

1. Officers ⟹4, 51—Legislature cannot abolish or shorten term of offices fixed by Constitution.

The Legislature is without power to abolish constitutional offices or to shorten terms of office which are fixed by the Constitution.

2. Asylums ⟹4—Act creating board of control not void as interfering with constitutional office of board of managers.

Acts 36th Leg. (1919) c. 31, creating the board of control, does not violate Const. art. 16, § 30a, empowering the Legislature to provide by law that members of the board of trustees or managers of certain institutions may hold office for six years, one-third of the members to be elected or appointed every two years, in such manner as the Legislature may determine, in so far as it relates to the management of insane asylums, as against the objection that the members of the board of managers were constitutional officers.

3. Officers ⟹4—Legislature may abolish offices of its own creation notwithstanding present incumbencies.

Interference with the statutory terms of present incumbency of state offices constitutes no obstacle to the exercise of the power of the Legislature to abolish offices of its own creation.

Question certified from Court of Civil Appeals of Third Supreme Judicial District.

Suit by Atlee B. Ayers and others against S. B. Cowell and others for an injunction. A temporary writ was granted, and respondents appeal. On question certified from the Court of Civil Appeals. Question answered.

C. M. Cureton, Atty. Gen., and W. A. Keeling and C. L. Stone, Asst. Attys. Gen., for appellants.

John H. Bickett, Jr., and L. M. Bickett, both of San Antonio, for appellees.

GREENWOOD, J. Question certified from the Court of Civil Appeals of the Third Supreme Judicial District of Texas, in an appeal from the district court of Travis county.

The certificate of the honorable Court of Civil Appeals is as follows:

"To the Supreme Court of Texas:

"In the above styled and numbered cause, now pending in this court on appeal from the district court of Travis county, Tex., the question hereinafter stated, which is material to a decision of this appeal, arises upon the statement of the nature and result of the suit and the facts disclosed by the record, which are as follows:

"This suit was brought by appellees against appellants in the district court of Bexar county, Tex., seeking to enjoin apellants, and each of them, from appointing or attempting to appoint any person to the place of supervisor or director or manager or any other person to any subordinate place or position with the Southwestern Insane Asylum and from in any manner interfering with appellees in the discharge of their duties as members of the board of managers of the Southwestern Insane Asylum, or from interfering with any person serving in the employment of said asylum, or from interfering with appellees or any person serving under their direction in the possession, management, and control of the record, books, papers, and property belonging to said institution or from interfering with appellees in their management and control of persons serving under appellees in said institution in any manner whatsoever. Upon plea of privilege said cause was transferred to the district court of Travis county, and on February 24, 1920, the district court of Travis county considered and granted a temporary injunction in the following terms: