POWER OF MUNICIPALITIES TO AMEND THEIR OWN CHARTERS

A municipality is a legal corporate entity formed by Charter derived from a sovereign authority, to establish and maintain over the persons and property within a prescribed area, a local governmental agency subordinate to the sovereign authority, with such powers for local government, improvement and convenience as may be prescribed by law. The authority conferred may be for purposes of local regulation and also for corporate municipal purposes. The first is governmental in its nature, the other is in the nature of business enterprise. Authority to enact local ordinances, to enforce police regulations, to punish for municipal offenses and to impose property and license taxes, is governmental. Authority to supply fuel, water, lights and other useful conveniences for the inhabitants and property within its limits, is in its nature corporate as distinguished from governmental. A municipality being a subordinate governmental agency can lawfully exercise only such authority as is conferred by law, either expressly or by implication from that expressly given. Where authority is expressly given, all the power that is fairly necessary to the effective exercise thereof, may be implied in the absence of some controlling provision or principle of law applicable to the particular case. All reasonable doubts as to the existence of authority are resolved against the municipality, but where authority appears, a large latitude is allowed in the exercise of the authority, when the law applicable thereto is not thereby violated. The powers of municipalities are usually found in the charters granted; but they may appear in other applicable statutes. In the absence of organic limitations the sovereign lawmaking power has plenary authority over the existence and powers of a municipality, when private rights are not illegally affected by any action taken. Congress may establish, maintain or abolish municipalities or may authorize the same to be done within the territory not included in a sovereign State. The States may establish, maintain or abolish municipalities within their respective borders. As the charter and other statutes under which a municipality may exist and operate, constitute its chart of authority within which it must confine its operations, it is of course not within the power of the

municipality to change its charter authority unless such power is legally conferred by the sovereign from which the charter was received. Whether the power to change its own charter may be legally conferred upon a municipality is the pertinent enquiry here. Several States by organic provision expressly authorize the legislature to confer upon municipalities power to amend their charter rights. The decisions in such States are not to be considered here. In practically all the sovereign States of America the lawmaking power is by the Constitution vested in a Senate and House of Representatives, and from this express provision an implied principle of constitutional law is deduced and enforced that the legislature cannot delegate to any other authority the general lawmaking power of the State. From necessity and by immemorial usage this implied principle has not been regarded as denying to the legislature the right within its discretion to authorize municipalities to adopt ordinances that have the force of law within the proper sphere of their operation, where such ordinances and their enforcement are reasonable and do not violate any provision or principle of law applicable thereto. The legislature cannot legally authorize a municipality to exercise the general lawmaking power of the State, or to enact or to alter or to repeal a statute; but the legislature may enact a statute declaring what the law shall be and may make the enforcement of the statute depend upon a definite contingent event to be determined by municipal action. It is within the power of the legislature to confer upon a municipality appropriate authority for municipal purposes and to make the power conferred depend upon ratification by the municipality. Likewise the legislature may by appropriate statute make an existing law cease to operate as municipal authority upon the happening of a stated contingent event to be determined by the municipality. This may be done by a statute authorizing the municipality to take definitely defined action and declaring that upon such action taken the stated statute authority will be superseded; or it may be done by a statute authorizing definite municipal action and repealing all inconsistent statutes upon the authorized action being taken. These general propositions have perhaps been rescued from serious controversy.

In jurisdictions where special or local laws are forbidden or where uniformity is required in conferring governmental powers upon municipalities or where some peculiar circumstances appar-

ently control, it has been held that statutes attempting to authorize municipalities to alter or amend their own charters are invalid because they are violative of the implied principle of constitutional law that legislative power cannot be delegated, which principle is devolved from an express vesting of the legislative power of the State in a Senate and House of Representatives. See *Dexheimer v. City of Orange,* 60 N. J. L. 111, 36 Atl. Rep. 706; *Elliott v. City of Detroit,* 121 Mich. 611, 84 N. W. Rep. 820; *In Re Municipal Charters,* 86 Vt. 562, 86 Atl. Rep. 307; *State ex rel. Muller v. Thompson,* 149 Wis. 488, 137 N. W. Rep. 20, 28 Ann. Cas. 774, 43 L. R. A. (N. S.) 339.

In other jurisdictions where general laws are required or special laws are forbidden in regulating municipalities, or where both may be used it has been held that the legislature may authorize municipalities to amend their own charters. See *Yazoo City v. Lightcap,* 82 Miss. 148, 33 South. Rep. 949; *Dobbin v. City of San Antonio,* 2 Texas Unreported Cases, 708; *Nelson v. Town of Homer,* 48 La. Ann. 258, 19 South. Rep. 271.

In some jurisdictions it is held that a municipal ordinance not inconsistent with organic provisions has the force of a local law within its sphere of operation, and that to this extent such an ordinance when duly authorized to do so may supersede or supplement in the municipality a general State law. See *Village of St. Johnsbury v. Thompson,* 59 Vt. 300, 9 Atl. Rep. 571; *Plinkiewisch v. Portland Ry., Light & Power Co.,* 58 Ore. 499, 115 Pac. Rep. 151; *City of San Luis Obispo v. Fitzgerald,* 126 Cal. 279, 58 Pac. Rep. 699; *Bearden v. City of Madison,* 73 Ga. 184. See also *Thrower v. City of Atlanta,* 124 Ga. 1, 52 S. E. Rep. 76, 1 L. R. A. (N. S.) 382, and notes.

Is the constitution in reality violated by a statute which purports to authorize a municipality to amend its own charter, when the constitution merely vests the lawmaking power of the State in a Senate and House of Representatives and does not expressly or by *necessary* implication forbid the stated power to be conferred?

The lawmaking power of the legislature of a State is subject only to the limitations provided in the State and Federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional

law. In construing a statute it must be assumed that in its passage the legislature intended to conform to the requirements and limitations of organic law, and to provide a valid effective statute in accord with all the provisions of the constitution affecting the subject. Where one construction of a statute would render it unconstitutional and another construction that is fairly warranted by its terms and purpose, would accord with organic law, the latter construction should be adopted, since legislation is subject to applicable limitations of the constitution, and a valid statute is presumed to have been intended by the lawmaking power in its enactment. A statute should be so construed and applied as to make it valid and effective if its language does not exclude such an interpretation.

It is essentially the duty of the courts to sustain the constitution, and to decline to enforce a statute when its enforcement would violate organic law; yet in exercising the exceedingly delicate and responsible power and duty to declare legislative enactments to be contrary to the constitution, and therefore inoperative, the courts should, to maintain the judicial authority unsullied, be assiduous to keep entirely within their own organic limitations, and to refrain from declining to enforce statutes except in cases of clear and unmistakable violations of the constitution that require judicial action to give effect to the supreme law of the land on the subject, pursuant to the oath taken by all officials to "support * * * * the constitution."

In order to justify the courts in declaring inoperative as a delegation of legislative power, a statute conferring particular duties or authority upon municipalities, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department of the State government, and the conferring of it upon the municipality is not warranted under the provisions of the constitution. In vesting the legislative power of the State in the Senate and House of Representatives, the constitution by implication forbids the delegation by the legislature of the general lawmaking power of the State to any other officers; but by immemorial usage based on public necessity this implication does not apply to the powers that may be conferred upon municipalities for local governmental purposes. Where a statute does not violate the Federal or State Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power and do

not assume to regulate State policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

A statute may be in whole or in part repealed or superseded or abrogated by implication of law as a result of the due enactment of a subsequent statute covering the same subject, or by the operation of a later statute upon the occurrence of a definitely specified contingent event.

If it is clear from its terms and purpose that the intent of a statute is that it shall supersede another statute upon a stated contingent event, the courts will give effect to such intent, when organic law is not thereby plainly violated, since the intent of the law is its vital force, and the province of the courts is to ascertain and effectuate the valid legislative purpose.

Neither the constitution nor the common law defines the line of separation between the powers that shall be exercised directly by the legislature and those that may be indirectly exercised through delegated authority conferred upon municipal governmental agencies. Where the legislature has authority to provide a governmental regulation, and the organic law does not prescribe the manner of adopting or providing it, or the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislative, or indirectly by the legislative use of any appropriate instrumentality, where no provision or principle of organic law is thereby violated.

The legislature may confer upon a municipality any power or authority that does not conflict with the State or Federal Constitution; and any power or authority conferred should be so exercised by the municipality as not to violate either organic or other law. Does the conferring of power upon a municipality to amend its own charter violate the State or Federal Constitution? Clearly the Federal Constitution has no application where private rights are not illegally invaded. Where the State Constitution does not forbid the conferring of such a power upon a municipality, and no question of the use of special or general laws is involved, the proposition may or may not be affected by the usual provision of the State Constitution expressed in varying language that the law-making power of the State is vested in the legislature. From this provision is adduced the implied principle of constitutional law

that the lawmaking power vested exclusively in the legislature cannot be delegated.

Where the intent of a statute can be effectuated in a way that conforms to the requirements of organic law, the courts should give that construction and application to the statute.

The legislature cannot legally authorize a municipality to repeal a statute or to exercise general lawmaking power; and an act that in unambiguous terms purports to confer such authority upon a municipality may be judicially adjudged inoperative because in conflict with the provision of the constitution vesting the lawmaking power of the State in the legislature, which power cannot be delegated. But if a statute can be given a construction that will accord with the constitution and express the legislative intent, it should be done, even though the form of the statute might appear *prima facie* to be at variance with organic law. To illustrate: Where a statute authorizes a municipality to adopt regulations for purely municipal subjects that are inconsistent with existing laws, and the statute in terms repeals all laws in conflict with the authority conferred, the enactment may appear *prima facie* to authorize the municipality to change existing statutes; but upon closer analysis the statute may fairly be construed to authorize municipal regulation of a municipal subject, and upon the due adoption of such regulation, the statute by its own force and terms repeals or supersedes all inconsistent laws, leaving the municipal regulation to govern, the regulation being of a character that could have originally been committed to the municipality. When the legislative intent permits such a construction, the courts should give to the enactment the effect that will comport with the constitution.

The authority of the legislature to regulate the powers of municipalities for proper municipal purposes is not curtailed or limited by the usual provision of the constitution that the legislative authority of the State is vested in a Senate and House of Representatives. Nor does the conferring of *quasi* legislative powers upon a municipality for local governmental purposes violate the implied principle of organic law that the legislature shall not delegate its general lawmaking power. See *State v. Westmoreland,* 133 La. 63 South. Rep. 502: *Stoutenburgh v. Hennick,* 129 U. S. 141, 9 Sup. Ct. Rep. 256; *Munn v. Finger,* 67 Fla., 64 South. Rep. 271.

Where the legislature has express authority to prescribe the powers of a municipality and to provide for its government by general or by local laws, the legislature may by appropriate statutes authorize the municipality to adopt ordinances regulating its administrative affairs, and provide that upon the adoption of such ordinances and their ratification in a prescribed manner, the ordinances shall be effective, and that all inconsistent statutes shall be repealed by force of the statute conferring the authority to adopt ordinances on the subject. This does not delegate the general lawmaking power of the State, nor authorize a municipality to repeal a statute. The effect of such a statute conferring power upon a city to amend its charter is to repeal conflicting statutes upon the authorized action being duly taken by the municipality in accordance with express statutory authority in a matter that is purely municipal in its nature and within the power of the legislature to confer in the first instance upon the city. See *Munn v. Finger, supra,* and *City of Jacksonville v. Bowden,* 64 South. Rep. 67 Fla. This is not doing by indirection what cannot be directly done, for the change made in the charter powers given by prior statutes, is accomplished not by the taking of the municipal action, but by the force and operation of the statute which becomes effective to change the prior law upon the happening of a definitely stated contingent event, *viz,* the taking of the authorized municipal action for a municipal purpose.

Thus it seems that when not expressly or by *necessary* implication forbidden to do so by some provision of the constitution, it is within the power of the legislature to enact a statute that in effect operates to repeal all statutes in conflict with municipal action duly taken under the later statute, upon the taking of such action, even though such action is to change the charter powers, when the authority given is for a proper municipal purpose, that could have been conferred upon the city in the first instance, and the repeal of the conflicting statutes is effected by the force of the statute conferring the power upon the municipality. Such statutes do not in effect delegate the legislative power of the State, and do not violate constitutional provisions vesting the legislative power of the State in a Senate and House of Representatives.

James B. Whitfield.

Supreme Court of Florida.

"ESTATES IN EXPECTANCY"

Beyond question, the law as to "estates in expectancy" is the most unsatisfactory part of our jurisprudence,—reversions, reversionary interests, vested and contingent remainders, executory bequests and devises *et id omne genus*, seeming to our text-writers and courts as matters to be approached from the standpoint of "the nicest and most abstruse learning", rather than as having frequent and immediate application to the affairs of everyday life and as requiring for the solution of the problems that they may present only logical reasoning from fundamental principles. Also the many adjudicated cases bearing upon these matters, so far from resulting in clear and definite rules, have, with their increasing number, but added to the confusion and difficulties with which feudal doctrines, long obsolete, originally surrounded them.

In this paper an attempt is made to analyze the general situation as to "estates in expectancy" from the basis of fundamental legal principles, disregarding for the time being certain rules and doctrines with which the conclusions here deduced may conflict. Later, these and other long current rules and doctrines bearing upon the subject under consideration are discussed from the standpoint of the conclusions here deduced.

For the purposes of brevity and clearness this discussion will be limited chiefly to remainders, so-called, created by will, but it is believed that the resaoning will apply, *mutatis mutandis*, to remainders however created, as well as to reversions, executory interests and all other forms of "estates in expectancy."

When a complete estate in anything subject to private ownership vests in a person, this estate includes with right of immediate possession and enjoyment the right of this person to have this possession and enjoyment and all other property rights pertaining to the *res* continued in "himself, his heirs and assigns forever", or so long as this *res* exists; this right to have such possession and enjoyment so continued being, it would seem needless to say if it

As is pointed out in the following pages, "estates in expectancy" are, as entities, impossible. The term is the result of erroneous concepts and itself a frequent source of error; it is here used in the meaning usually attached to it in default of any other and better term to indicate the nature of this discussion.

II Bl. Comm. 163.

were not so generally assumed to the contrary, as much a present right as is the right of immediate possession and enjoyment itself. We live, act and have rights in the present, a "future right" is as unthinkable as a future today, the term is self-contradictory, and so, for the same reason, is the expression "estates in expectancy" itself in so far as it is held to denote anything in the nature of actual property rights.

Property rights may be devised or bequeathed either absolutely or subject to conditions, and these conditions may, in legal parlance, be either subsequent or precedent.

A will speaks for the testator at the moment of his decease, and when, so speaking it distributes the property rights relative to the thing bequeathed or devised, so that certain of these rights, essentially those of immediate possession or enjoyment vest in a certain person subject to be devested on the happening or coming to pass of an event sure to occur, a condition subsequent, while the residuary property rights in the *res* are vested in another person, a vested remainder is said to be created in the latter, the rights of the former, the holder of the particular estate, are, however, none the less vested in him, but vested subject to be devested by an event sure to occur. The estate of each in the *res* is but a limited or partial one, and each of these partial estates is complementary to and contemporaneous with the other; the existence of one necessarily involves the existence of the other and both together make up the full estate in the *res,* in other words, the sum total of the property rights relative thereto.

So far as we now are concerned, the limitation of the present possession or enjoyment of the *res* by an event, a condition subsequent, sure to occur, is the essential characteristic of a particular estate, while the essential characteristic of a vested remainder is the fact that its holder must wait for the happening or coming to pass of an event, a condition precedent, sure to occur before he can enjoy the full estate in the *res.*

When the estate in a *res* is bequeathed or devised to a person, subject to be devested on the happening or coming to pass of an event, a condition subsequent, that may or may not occur, but on the occurrence of which this estate would pass to another specified person, a "contingent remainder" is said to be created in the latter. The term "remainder" as used in this connection is either a misnomer, or we must attribute to it a meaning entirely different from what it bears in the term "vested remainder", for not-

withstanding the almost uniform use of the term to the contrary by our text-writers and courts, under such a bequest or devise a full, not a partial or particular estate vests in the first taker and there remains until devested by the occurrence of the event or condition subsequent specified, if it ever occurs; in such a case there is also no residuary estate or remainder, actual or contingent created by the will. The so-called remainder-man has no estate whatever in the *res,* he has but a chance or possibility of acquiring an estate therein on the condition (precedent), that a certain event which may or may not occur, happens or comes to pass, this condition precedent being assumed for the present to be identical as a fact or event with the condition subsequent on the happening or coming to pass of which the estate of the first taker is devested from him, and farther, it seems almost needless to repeat, the estate in the *res* which the so-called contingent remainderman has a chance or possibility of taking, is not a partial estate, a remainder, but a full estate therein; his interest is not a possible or contingent remainder, but a possible or contingent full estate in the *res.*

Not only, as is assumed in the above discussion, may a person be endowed with a full or complete estate in the *res* subject to be devested by an event that may or may not occur, but on the occurrence of which this estate would vest in another specified person, but the testator may provide in his will that the one who is to have the immediate enjoyment of the *res* shall have but a limited estate therein ,that is, an estate to be devested on the happening or coming to pass of an event sure to occur, while the potential beneficiary is to take the full estate in the *res* on the happening of another event that may or may not happen or come to pass; now this latter event, the occurrence of which is made the condition precedent to the taking of the estate in the *res* by the possible beneficiary might happen prior or subsequent to the event which terminates the estate in the first taker or contemporaneous, perhaps necessarily so, with it. Each of these conditions will now be considered and illustrations will best serve as bases for our discussion.

A devises to B for life with "remainder over to C if C shall live until he reaches the age of twenty years. On the decease of A, B takes a partial or limited estate in the *res,* in other words, a particular estate; accordingly, the residuary property rights, or remainder of the estate therein must then vest in the residuary de-

visees of A, or, if none such be provided in the will, in the heirs of A, subject to be devested by C. becoming twenty years of age. If C dies before attaining this age, but before the decease of B, this remainder vests indefeasibly in these devisees or heirs. If B dies before C becomes twenty years of age then, following the present line of reasoning, the full estate would vest in the residuary devisees or heirs of A, subject to be devested by C reaching the age necessary to have the full estate vested in him. If, on the other hand, C becomes twenty years of age before the decease of B, on his reaching this age the remainder of the estate in the *res* over and above the estate vesting in B devests from the residuary devisees or heirs of A and vests in C, or, in other words, C will then have a vested remainder of the estate.[1]

If A devises to B for life with "remainder" over to C if C shall survive B, C, of course, has but a chance or possibility of acquiring an estate in the *res,* his taking being subject to the occurrence of an event, a condition precedent, that may never come to pass, but coming to pass is necessarily contemporaneous with the event that terminates the estate in B. Here, during the lifetime of B, the remainder of the estate over and above the limited or particular estate in B, must vest in the residuary devisees or heirs of A, subject to be devested by the event, the condition subsequent, of C surviving B; if, however, C dies before the decease of B, this remainder vests indefeasibly in the residuary devisees or heirs of A. If, on the other hand, C becomes twenty years of age before the decease of B, on his reaching this age the remainder of the estate over and above that vesting in B devests from the residuary devisees or heirs of A and vests in C, in other words, C will then have a vested remainder in the *res* to take effect in possession and enjoyment on the death of B.

If A devises to B for life with remainder over to C if C shall survive B, C, of course, has but a chance or possibility of acquiring an estate in the *res,* his taking being subject to the occurrence of an event, a condition precedent, that may never come to pass, but coming to pass, is necessarily contemporaneous with the event that terminates the estate in B. In this case, during the life of B, the remainder of the estate over and above the particular estate

[1] For the present we are concerned only with reasoning from the basis of fundamental principles; later will be discussed the rule that a remainder must take effect in possession immediately on the termination of the particular estate.

vesting in him must vest in the residuary devisees or heirs of A subject to be devested by the condition subsequent of C surviving B, and if C dies before the decease of B, then this remainder vests indefeasibly in the residuary devisees or heirs of A.

If the estate be devised to B with no limitation as to the life of B or otherwise, but with "remainder" over to C if C shall survive B, B on the decease of the testator takes a full estate in the *res*, subject to be devested from his heirs or assigns in the event of C surviving him; in the event of C predeceasing B, on the death of C the full estate in the *res* is indefeasibly vested in B. In this situation, the residuary devisees or heirs of the testator have no property rights or interests in the *res* whatever, either vested or contingent.

A further illustration showing an application of this last analysis to conditions that might easily arise might not be amiss: A devises to his son B with "remainder over" to B's wife C if she should survive B. B and C are lost at sea in the same shipwreck, or in some other way lose their lives under such circumstances as render it extremely difficult, if not impossible, to determine which survived the other. Under such conditions the conflicting claims of the heirs of B and of the heirs of C would be determined by the fundamental rule of evidence that he who asserts the claim has the burden of proof and as the estate was vested in B, it would remain in his heirs and assigns unless the heirs of C could show that it was devested by the event, the condition subsequent, of C surviving her husband. If the estate was devised to B for life with "remainder over" to his wife C if she survived him, then by a parity of reasoning, on the death of B and C under such circumstances as those above suggested, the remainder vesting in the residuary devisees or heirs of the testator. would as the full estate in the *res* continue in these devisees or heirs until the heirs of C could show that C survived B.

Granting that the assumptions as to estates, or property rights, made in the preceding discussion are sound and that there are no fallacies or breaks in the reasoning based on these assumptions, it follows that the answer to the question as to whether a given "remainder" is vested or "contingent" will depend on whether by the will creating it such remainder the enjoyment of the *res* in full ownership must await an event, a condition precedent, sure to occur, or whether such enjoyment of the *res* is subject to an event, a condition precedent that may or may not occur, and this is to be

determined by the evidence in the case, by the terms of the instrument itself as these terms are logically interpreted according to the accepted canons of construction, and in view of such evidence *aliunde* as may be legally admissible.

The danger of holding that the "Rule in Shelley's Case" is a rule of construction or of evidence might be suggested in this connection; this rule, however, is essentially different in its character from the generally accepted rules as to "estates in expectancy" which we have inherited as corollaries of feudal doctrines. The "Rule in Shelley's Case", whatever may have been its origin, was fundamentally and independently a rule of public policy, an ultimate and substantive law; the great mass, however, of the commonly accepted rules as to remainders, reversions, and the like, involving "the nicest and most abstruse learning", were for the greater part built upon the feudal doctrine of the necessity of livery of seizin to effect the conveyance or transfer of land; but notwithstanding the fact that "livery of seizin" has long been obsolete both in this country and other countries where the common law has formed the basis of their legal systems, these rules, contravening the clearest deductions from fundamental legal principles, and in spite of the healthful principle of *ratione cessanti, lex cessat,* still remain to perplex and confuse both lawyers and courts.

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