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Ohio Clarifies Position on Judicial Impartiality.

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CONSTITUTIONAL LAW—Due Process—Ohio Clarifies Position On Judicial Impartiality

State ex rel. Brockman v. Proctor, 298 N.E.2d 532 (Ohio 1973).

Charles Brockman was charged with certain traffic violations in the chartered city of Blue Ash, Ohio and ordered to appear before the mayor's court. The city of Blue Ash had a council-city manager form of local government. The mayor presided at all meetings of the city council and voted on all matters, including those concerning the budget. He also served as judge in the mayor's court, having jurisdiction to hear and determine cases involving violations of municipal ordinances and criminal cases involving traffic violations. Brockman objected to the jurisdiction of the mayor's court and contended that he was being denied a trial before a disinterested and impartial judge, as guaranteed by the Fourteenth Amendment of the United States Constitution. The mayor's court overruled his objection. Subsequently, Brockman sought relief by a writ of prohibition in the Supreme Court of Ohio. Held—*Writ denied.* To compel a defendant to stand trial before a mayor who has no executive authority but who is a voting member of the city council which determines appropriations and expenditures of revenue derived from fines and forfeitures does not constitute a denial of due process.[1]

"A fair trial in a fair tribunal is a basic requirement of due process,"[2] which can be satisfied only by the existence of a truly impartial judiciary. At common law in England, the idea that "no man ought to be a judge in his own cause"[3] was rigidly applied as one means to guarantee impartiality to an accused. The most celebrated example of this doctrine can be found in *Rex v. Great Charte*[4] where the conviction of a pauper in a two-judge court was later voided because one of the justices was a resident of the parish from which the pauper came.[5] This theory was also followed in the United States in *Pearce v. Atwood*,[6] where the Supreme Court of Massachu-

1. State *ex rel.* Brockman v. Proctor, 298 N.E.2d 532 (Ohio 1973).

2. *In re* Murchison, 349 U.S. 133, 136 (1955). In *Murchison*, a Michigan state judge had served as a "one-man" grand jury and later adjudged two witnesses guilty of contempt, after a court hearing, for events which had occurred before his grand jury.

3. Bonham's Case, 77 Eng. Rep. 646, 652 (K.B. 1610). As translated from the Latin: *[N]on debet esse Judex in propia causa . . . .*

4. 93 Eng. Rep. 1107 (K.B. 1792).

5. The one justice was held to be an interested party because as a resident he was subject to pay the poor's rate (some form of welfare). Rex v. Great Charte, 93 Eng. Rep. 1107 (K.B. 1792).

6. 13 Mass. 324 (1816). The doctrine was narrowed by Ohio in Thomas v. Town of Mt. Vernon, 9 Ohio 291 (1839), where the mayor was held to have jurisdiction to determine the validity of an ordinance, even though a citizen.

setts held that a judge should be disqualified where he was an inhabitant of the town which would receive part of the fine if the accused were convicted.[7]

In an attempt to minimize the opportunities from which conflicts of interest arise when the government is involved in litigation, the United States Constitution established the separation of powers and duties among the three branches of government. The judicial power is vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain or establish.[8] This separation has been carried over into state governments,[9] but not, apparently, to many municipal governments.[10]

The judiciary on a local level is provided for by state statutes.[11] The power to form a governing body, however, is given to municipalities in most state constitutions through a "home rule" provision.[12] A home rule city has the statutory right to exercise all powers incident to the enjoyment of local self-government not prohibited by the constitution or laws of the state.[13]

In most jurisdictions the constitutional provisions for home rule clearly demonstrate that state law must provide the foundation from which municipal government arises.[14] The Ohio Constitution Home Rule Provision, which was involved in the instant case, grants significant freedom to the municipalities:

> Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.[15]

This provision is unique for two reasons. First, a municipality's home rule powers are self-executing. *State ex rel. Petit v. Wagner*[16] pointed out

7. *Id.* at 341. The justice of the peace could not preside in the suit because one-half of the fine, if the accused were convicted, would go to the town of his residence.

8. U.S. CONST. art. III, § 1.

9. *See, e.g.*, MAINE CONST. art. III, § 1; MASS. CONST., § 31 art. XXX, at 76; N.Y. CONST. art. III, § 1, art. IV, § 1, and art. VI, § 1; TEX. CONST. art. II, § 2.

10. *See, e.g.*, Sarlls v. State, 166 N.E. 270 (Ind. 1929); Dieruf v. Louisville & Jefferson County Bd. of Health, 200 S.W.2d 300 (Ky. 1947); State v. Truder, 289 P. 594 (N.M. 1930); Eggers v. Kenny, 104 A.2d 10 (N.J. 1954); Gaud v. Walker, 53 S.E.2d 316 (S.C. 1949).

11. *See, e.g.*, ME. REV. STAT. ANN. tit. 4, § 1001 (1964); MASS. ANN. LAWS ch. 222, § 1 (1955); N.Y. UNIFORM JUSTICE CT. ACT, art. 2, § 201 (McKinney Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 2385 (1963), art. 2386 (Supp. 1974), and art. 2387 (1963).

12. *See, e.g.*, ARIZ. CONST. art. XIII, §§ 2-3; MASS. CONST., § 235 art. LXXXIX, at 264; MO. CONST. art. VI, §§ 19-20; N.Y. CONST. art. IX, § 1; TEX. CONST. art. II, § 5.

13. 1 E. YOKLEY, MUNICIPAL CORPORATIONS § 57, at 74, 75 (Supp. 1973) and § 58, at 112 (1956).

14. Blume, *Municipal Home Rule in Ohio: The New Look*, 11 W. RES. L. REV. 538 (1960).

15. OHIO CONST. art. XVIII, § 3.

16. 164 N.E.2d 574 (Ohio 1960).

that a chartered municipality had power to enact and enforce ordinances relating to home rule powers, regardless of procedural state law on the subject; but, a non-chartered city does not have this same authority.[17] Second, the powers considered to be matters of local self-government are beyond state legislative interference. As late as 1964, the Ohio Supreme Court applied in *Leavers v. City of Canton*[18] the rule that an ordinance passed by a "chartered" city concerning local government was valid, although in clear variance with the state law.[19]

By allowing such freedom in local government, the duties and powers of the public officers in Ohio's chartered cities remain under the control of the local community. Ohio's state statutes serve as guidelines for local municipalities and need be rigidly followed only by non-charter cities.[20] According to the state statutes, the mayor shall be the executive head of the community and chief conservator of the peace, and shall have the powers and duties provided by law.[21] One statutory duty provided for is that of presiding over the mayor's court:

> In all municipal corporations not having a police court and not being the site of a municipal court . . ., the mayor of such municipal corporation has jurisdiction to hear and determine any prosecution for the violation of an ordinance of the municipal corporation, and has jurisdiction in all criminal causes involving moving traffic violations occurring on state highways located within the boundaries of the municipal corporation . . . .[22]

Ohio courts have seen much litigation concerning the ability of one individual to be totally impartial when serving as both mayor and judge. The possible existence of a conflict of interest resulting from the mayor's assumption of judicial functions was first presented in *Tumey v. Ohio*.[23] Here the

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17. *Id.* at 578; *accord*, Morris v. Roseman, 123 N.E.2d 419 (Ohio 1954). *See also* Village of Perrysburg v. Ridgway, 140 N.E. 595 (Ohio 1923).

18. 203 N.E.2d 354 (Ohio 1964). In applying the rule the Ohio Supreme Court held that an ordinance passed by non-charter city, providing that city fire department employees must retire at age 65, was at variance with a state statute and thus invalid. *Id.* at 356.

19. *Id.* at 356. *See* Bindas v. Andrish, 136 N.E.2d 43 (Ohio 1956); State *ex rel.* Arey v. Shirell, 53 N.E.2d 501 (Ohio 1944); City of Mansfield v. Endly, 176 N.E. 462 (Ohio Ct. App.), *aff'd*, 181 N.E. 886 (Ohio 1931); Froelich v. City of Cleveland, 124 N.E. 212 (Ohio 1919); State *ex rel.* City of Toledo v. Lynch, 102 N.E. 670 (Ohio 1913).

20. State *ex rel.* Petit v. Wagner, 164 N.E.2d 574 (Ohio 1960).

21. OHIO REV. CODE ANN. § 24 (Page Supp. 1973) and §§ 23, 30, 32, and 40 (Page 1954). These statutes provide that the executive power of the village shall be vested in a mayor elected for 4 years who shall be chief conservator of the peace, shall not vote except in cases of a tie and shall have the powers and duties as provided by the general law and by the bylaws and ordinances of the municipal corporation. He is also required to communicate to the legislature a statement of finances, and all fines collected by him shall be paid into the treasury.

22. OHIO REV. CODE ANN. § 1905.01 (Page 1968).

23. 273 U.S. 510 (1927).

mayor served as judge in the mayor's court and was paid compensation for such services only from the fines he collected in his judicial capacity. Additionally, the revenue from this court added materially to the financial prosperity of the municipality, for which the mayor, as head of the local government, was responsible.[24] The United States Supreme Court reasoned that a financial interest of the court in its decision constituted an unfair and partial tribunal within the prohibition of the 14th amendment. The Court further stated that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in the subject matter which he was to decide, rendered the decision voidable.[25] Here, the Court noted that the test for impartiality was whether the dual function of mayor and judge is one

> which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict a defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . .[26]

Unlike the mayor in *Tumey*, in *Dugan v. Ohio*[27] the mayor served in a judicial capacity, but his salary was not dependent upon the revenue received from convictions. He was a member of a commission form of government with a city manager performing the executive functions. The Court held that the mayor's interest in the financial policy of the city was too remote to be influential in his judicial decision-making capacity. In following *Tumey*, the Court's finding of "no pecuniary interest" was the primary basis for the determination that the accused had not been denied due process.[28]

The scope of the *Tumey* decision as it related to a possible conflict of interest resulting from a mayor's assumption of judicial duties was broadened by the Supreme Court in *Ward v. Village of Monroeville*.[29] The Court stated that a possible temptation of partiality and denial of due process to an accused could exist where the mayor exercised wide executive authority in the community.[30] The mayor in his executive capacity as head of the village was responsible for its financial policy, with the mayor's court providing up to 50 percent of the village's revenue. The Court pointed out that the mayor's executive responsibilities for a city's financial condition could make him partisan to maintaining a high amount of contribution from the mayor's court.[31]

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24. *Id.* at 520.
25. *Id.* at 524.
26. *Id.* at 532.
27. 277 U.S. 61 (1928).
28. *Id.* at 65.
29. 409 U.S. 57 (1972). When heard in the Ohio Supreme Court, 271 N.E.2d 757 (1971), Justice Corrigan dissented. His dissent was upheld by the United States Supreme Court when they reversed the Ohio decision in 409 U.S. 57 (1972). Justice Corrigan has also dissented in the instant case (*Brockman*).
30. *Id.* at 62.
31. *Id.* at 61.

Some jurisdictions have attempted to achieve judicial impartiality by applying the theory of incompatibility of offices.[32] Such incompatibility exists where a duty in one office is subordinate to a duty in another, where there is a conflict in the two offices, or where the duties and functions of the offices are inherently inconsistent and repugnant.[33] An instance of incompatibility was found by the Supreme Court of Maine in *Lesieur v. Lausier*[34] where an individual holding the office of municipal judge was elected mayor. The office of mayor was found to be incompatible with the office of municipal court judge with the court pointing out that there could be conflicting interests where the mayor, as chief conservator of the peace, would have the duty to require that certain classes of cases be prosecuted in the municipal court, where he would, as judge, hear and determine these same complaints.[35] In Michigan, this type of conflicting interest has been eliminated by an express constitutional provision which prohibits a judge from serving in any other elective position during his tenure in office.[36] By requiring this additional safeguard, it would seem that the defendant's right to a fair and impartial trial would be greatly enhanced.

Although an individual was serving as both mayor and judge in the instant case, the court held there was no conflict of interest. In arriving at its decision, the court found that the direct pecuniary interest of a mayor in his judicial position, as in *Tumey*, or the creation of a mayor's office with wide executive responsibility for the financial condition of the community, as in *Ward*, were not present here. The majority instead paralleled the facts in *Brockman* to those in *Dugan* and stated that the mayor's relation to the financial policy of the municipality was too remote to warrant a presumption of bias.[37] As in *Dugan*, the mayor in *Brockman* was not the executive head of a city; a city manager was designated the chief executive and administrative officer of the city. The mayor, however, was a member of the city council, presiding over all meetings, besides performing his judicial duties.[38] And even though the mayor's court in *Brockman* contributed at least

32. *See, e.g.*, People v. Rapsy, 107 P.2d 388 (Cal. 1940) (city judge and city attorney offices held incompatible); Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960) (office of senator and township attorney incompatible); People v. Capuano, 327 N.Y.S.2d 17 (Monroe County Ct. 1971) (judge as member of town board held incompatible); *cf.* Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969) (a councilman owning stock in corporation involved in Urban Renewal project was an interested party and his vote on an Urban Renewal resolution was void).

33. Poynter v. Walling, 177 A.2d 641, 644 (Del. Super. Ct. 1965). Although the court was aware of this test, it liberally applied the principle and found that the offices of mayor and justice of the peace were not incompatible. *Id.* at 644.

34. 96 A.2d 585 (Me. 1953). *See also* Howard v. Harrington, 96 A. 769 (Me. 1916) (mayor and police court judge held incompatible).

35. Lesieur v. Lausier, 96 A.2d 585, 587 (Me. 1953).

36. MICH. CONST. art. VI, § 21.

37. 298 N.E.2d 532, 536 (Ohio 1973).

38. BLUE ASH, OHIO, ORDINANCES art. IV, § 4.01, and art. V, § 5.02 (1961). The

10 percent to the city's revenue with the mayor voting on all revenue appropriations,[39] the court emphasized that the mayor actually had "only the *legislative power* that a single member of a municipal council or commission holds."[40] Therefore, the trial at which the mayor determined the guilt or innocence of the defendant did not violate the requisites of due process.[41]

Justice Corrigan, however, in a strong dissent, argued that the mayor's impartiality can be affected where monies collected from fines and costs levied by the mayor in his court are paid into the general operating funds of the city, and that fact alone should be sufficient to disqualify him as a judicial officer.[42] It is clear that the outcome of any case heard in the mayor's court would affect the financial affairs of the city; thus the test should not be whether this is 50 percent as in *Ward*[43] or 10 percent as in the instant case;[44] the test should be the very existence *vel non* of a financial connection. "[O]ur system of law has always endeavored to prevent even the probability of unfairness,"[45] so if there should exist the slightest possibility of bias or prejudice in anyone's eyes, the judicial procedure should be changed.

Although the doctrine of separation of powers has not been incorporated into most municipal governments, the United States Supreme Court has described the city as a miniature state with the council as its legislature and the charter as its constitution.[46] It would appear then that this description would necessarily include an independent judiciary and the argument that it is "common" to vest the mayor with judicial authority would not sufficiently outweigh the desirability of separation of powers at the local level. Other states have managed to vest the judicial duties held by the mayor in Ohio in other public officers, such as the justice of the peace,[47] or the municipal[48] or police court[49] judge, in order to minimize the problem of conflicting interests. This is not to imply that those serving the dual functions of mayor and judge are not persons of the highest integrity, exhibiting the greatest self-sacrifice, or that they can not carry on their functions without

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council chooses the mayor by majority vote from among their number. The City Manager is also appointed by the council.

39. State *ex rel.* Brockman v. Proctor, 298 N.E.2d 532, 534 (Ohio 1973).

40. *Id.* at 536 (court's emphasis).

41. *Id.* at 536.

42. *Id.* at 536-537. Justice Corrigan dissented in Ward v. Village of Monroeville, 271 N.E.2d 757 (Ohio 1971) for much the same reason.

43. Ward v. Village of Monroeville, 409 U.S. 57, 58 (1972).

44. State *ex rel.* Brockman v. Proctor, 298 N.E.2d 532, 534 (Ohio 1973).

45. *In re* Murchison, 349 U.S. 133, 136 (1955).

46. Paulsen v. Portland, 149 U.S. 30, 38 (1893). *See also* 1 E. YOKLEY, MUNICIPAL CORPORATIONS § 38, at 77 (1956).

47. *See, e.g.*, CAL. CONST. art. VI, §§ 1, 5; CONN. CONST. art. 5, § 2; FLA. CONST. art. 5, § 11.

48. N.J. STAT. ANN. § 2A:8-1 (Supp. 1973).

49. N.Y. VILLAGE LAWS § 4-410 (McKinney 1973).

danger of injustice,[50] but it does mean that "justice must satisfy the appearance of justice."[51] The defendant should feel confident, in the first instance, that he is receiving a fair trial before a fair and impartial judge.

> [I]t is important in the administration of justice not only that our courts be presided over by judges who are fair and impartial, but . . . equally important that litigants believe that they are being tried by a judge who is fair and impartial and not influenced by any personal interest in the case.[52]

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50. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

51. Offutt v. United States, 348 U.S. 11, 14 (1954).

52. People v. McDonald, 167 N.Y.S.2d 394, 396 (Columbia County Ct. 1957). *See also* Van Schaick v. Carr, 289 N.Y.S. 495, 502 (1936); People v. Rowley, 264 N.Y.S.2d 42, 43 (Fulton County Ct. 1965).