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Constitutional Law—County Liability Under Article IX Section 5 of State Constitution

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court.[96] The majority in a per curiam opinion merely restated the holdings arrived at below.

The dissenting opinion, however, vigorously attacked the majority view that the Legislature has the power to vest the Magistrates' Courts of the City of New York with power to try misdemeanors. They argued that if the added language in 1925 (i.e., "inferior local courts of similar character") was meant to extend power to the Legislature to grant jurisdiction to Magistrates' Courts, it would only have been necessary to add "inferior local courts." The Magistrates' interpretation would render the words "of similar character" mere surplusage which could not have been the intention of the Legislature. Thus the dissent concludes that the words "of similar character" refer to courts which function outside New York having similar or equivalent jurisdiction to the Courts of Special Sessions. Given this interpretation, the State Constitution did not vest the Legislature with authority to enact Section 102 of the Defense Emergency Act.[97] As a result the dissent urges, as did defendants below, that the only way that a Magistrates' Court can obtain jurisdiction to try a misdemeanor is as provided in Section 131 of the New York City Criminal Courts Act,[98] which as previously stated, in effect, requires the consent of the defendant.

It appears that the purpose of the Act is to meet the dangerous problems that are ever present from the threat of enemy attack, especially from atomic raids. In passing such an act the Legislature realized that such dangers and problems must be met with the "least possible interference with the existing division of the powers of the government and the least possible infringement of the liberties of the people, including the freedom of speech, press and assembly."[99]

County Liability Under Article IX, Section 5 of State Constitution

Article IX, Section 5 of the New York State Constitution provides in part that the office of Sheriff will be an elective office. It further provides, "But the county shall never be made responsible for the acts of the sheriff."[1]

The immunity clause was first constructed by the court in *Wolfe v. Supervisors of Richmond County*.[2] The case involved an action under a statue making a city or county liable for damage caused by a mob or riot.[3] The question was whether the statute violated Article IX, Section 5. It was held that it

96. Supra note 86.
97. Supra note 89.
98. Supra note 91.
99. N.Y. Defense Emergency Act § 2.

1. This immunity clause has been in the Constitution since 1821, and proposed amendments in both 1867 and 1938 failed to remove it. Convention Proceedings and Debates 1867-1868, Vol. II, 924-926; revised Record, N.Y. State Const. Convention, 1938, Vol. I, 237, 1017, 2541.
2. 19 How. Prac. 370 (Sup. Ct. 1860).
3. Then L. 1855, ch. 428, now N.Y. Gen. Mun. Law, § 71.

did not. The clause was construed as follows, "The true construction of this clause is, that for anything done by the sheriff in the discharge of his official duties, the county shall not be liable."[4]

Subsequent to that decision the lower courts construed Article IX, Section 5 as holding the county immune from liability for the negligent acts of the sheriff or his deputies committed in the course of their official duties. For example, *Thomas v. Ontario County*[5] was an action to recover damages to plaintiff's airplane caused by the alleged negligence of a deputy sheriff, who had hired the plane to perform his official duties. In granting the motion by the county to dismiss the complaint, the court said: "Section 5 of Article 9 . . . provides . . .: . . . *'But the county shall never be made responsible for the acts of the sheriff.'* (Italics are mine)" and "If a county could be held responsible for the acts of the deputy sheriffs and cannot be held responsible for the acts of the sheriff as provided by the State Constitution, that provision of the State Constitution would be of little effect since the sheriff by necessity must act through his deputies in most instances."[6]

In the principal case, *Commisso v. Meeker*,[7] defendant Zambon, a Deputy Sheriff of Oneida County, had just apprehended a speeding motorist and parked his patrol car partly on the south shoulder of a three lane highway. Subsequently, the cars of defendants Mastrangelo, in which the plaintiff was a passenger, and Meeker approached from opposite directions. Both testified that they noticed the red flashing light on the county car. As Mastrangelo approached the county car, he turned to the left. At about the same time Meeker was allegedly attempting to pass a car. As a result both cars met head on in the middle lane.

This appeal is from the Appellate Division's affirmance[8] of the trial court's judgment that the three above defendants and the County of Oneida were negligent. The Court of Appeals affirmed the judgment as to defendants Meeker, Mastrangelo and Zambon and reversed as to defendant County of Oneida.[9]

Judge Froessel's opinion traces the constitutional history and the history of the court's interpretation of the county immunity clause and concludes: "It thus appears that the compelling mandate of the constitutional provision is crystal clear, stating in the plainest language that 'the county *shall never* be made responsible for the acts of the sheriff.' (Emphasis supplied.)"[10]

Chief Judge Desmond, in his dissent, takes the position that the constitutional provision protects the county, "from the historic, conventional duties

4. Supra note 2 at 373.
5. 187 Misc. 711, 65 N.Y.S.2d 257 (Sup. Ct. 1946).
6. Id. at 712, 65 N.Y.S.2d 258.
7. 8 N.Y.2d 109, 202 N.Y.S.2d 287 (1960).
8. 9 A.D.2d 865, 193 N.Y.S.2d 112 (4th Dep't 1959).
9. Supra note 7. The issue of insufficiency of evidence will be considered only so far as it bears on the issue of the constitutional immunity of defendant, County of Oneida.
10. Id. at 121, 202 N.Y.S.2d 292.

of the centuries-old office of Sheriff,"[11] and concludes that, "Such a provision has nothing whatever to do with the negligent handling of a county-owned automobile which happens to be driven by a county employee paid by the county but carrying the title of 'deputy sheriff.' "[12]

It should be noted that two judges, Van Voorhis and Foster, concurred with Judge Froessel's opinion, and that two judges concurred with Chief Judge Desmond in his dissenting opinion. The seventh, Judge Dye, concurs only in the result as to the county upon the ground that the evidence is insufficient as a matter of law to establish the negligence of the deputy. It is questionable whether Judges Van Voorhis and Foster should have concurred in Judge Froessel's holding as to the constitutional issue, since in their dissenting opinion they voted to reverse as to the deputy because of insufficient evidence. Thus, they were not required to pass on the constitutional liability of the county. However, this case does illustrate that the Court is evenly divided in their interpretation of the county immunity clause.

In view of the constitutional history and the lower court's seemingly consistent holdings as to the immunity of the county for the acts of a sheriff or his deputies,[13] it would appear that a great deal of reliance has been put on this interpretation of Article IX, Section 5. Judge Froessel seems to state the wisest course to follow when he says, "to hold the county liable in this case for the acts of the Sheriff would require us to cast aside the mandate of the Constitution and shift the liability from the surety to the county, which the Constitution directs shall never be responsible. This may not be done without recourse to a constitutional amendment."[14]

Existing Emergency Rent Controls Justified

In the matter of *Lincoln Building Associates v. Jame*,[15] the petitioner landlord challenged the constitutionality of the 1959 re-enactment and extension[16] of the Emergency Business Rent Control Law.[17] Petitioner claimed the statutes violated the due process clauses of the federal and state Constitutions[18] and the federal obligation of contracts clause,[19] in that the emergency upon which the statute was enacted no longer existed and hence the action of

11. Id. at 124, 202 N.Y.S.2d 295.
12. Ibid.
13. Iserean v. Stone, 3 A.D.2d 247, 160 N.Y.S.2d 336 (4th Dep't 1957); Hawkins v. Dominy, 18 Misc. 2d 221, 185 N.Y.S.2d 310 (Sup. Ct. 1959); Schnitzer v. County of Erie, 8 Misc. 2d 989, 168 N.Y.S.2d 217 (Sup. Ct. 1957); Mentillo v. County of Cayuga, 2 Misc. 2d 820, 150 N.Y.S.2d 97 (Sup. Ct. 1956).
14. Supra note 7 at 123, 202 N.Y.S.2d 294 (1960).
15. 8 N.Y.2d 179, 203 N.Y.S.2d 86 (1960).
16. N.Y. Sess. Laws 1959, ch. 809.
17. Ibid. It should be noted that the Emergency Business Rent Control Law is applicable only in cities of the state having a population of more than one million, thus only affecting New York City.
18. N.Y. Const. Art. 1, §§ 6, 11; U.S. Const. Amend. XIV.
19. U.S. Const. Art. 1, § 10.