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Municipal Corporations—The Local Unit

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However, the Court of Appeals, in the instant case, did not say that the Supreme Court is without jurisdiction because the Family Courts have exclusive jurisdiction; the Court based its decision on the fact that the Supreme Court's jurisdiction in equity was limited to that possessed by the English courts in 1776.[46] It would seem that it is not inconsistent with the traditions of equity to suggest that where infants are concerned the Supreme Court has inherent power to give those who have a right, a corresponding remedy.[47]

VII. Municipal Corporations

The Local Unit

Our modern local governmental institutions are the result of a complex and haphazard process of evolution rooted in Anglo-Saxon England. The first municipal charter was granted by Henry VI in 1439; but long before that time, and indeed before the corporate concept emerged, some local units had acquired a measure of autonomy. English local government was far from democratic; being founded upon a class society, it was dominated by the landed gentry and was plagued by devices which assured continuity of office. Its basic ideas, however, were brought to the new world by the colonists, who then adapted them to the character of the settlements here. Our present day local units are the result.[1]

Rooted as they are in history, our modern municipalities are the creatures of statute. They have certain of the attributes of sovereignty; but their powers are neither inherent nor capable of enlargement by the act of the municipality.[2] This basic premise was reaffirmed by the New York Court of Appeals in the 1951-

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46. See C. P. A. §64.

47. The courts of equity have a special interest in the protection of infants. 4 Pomeroy, Equity Jurisprudence, §§1303-1305 (5th ed. 1941). In New York equity has jurisdiction to provide for *custody* of a child in the absence of a marital action. Cadozo, J., in *Finlay v. Finlay*, 240 N. Y. 429, 432, 148 N. E. 624, 626 (1925). Many American jurisdictions allow a child to sue his parents although the suit is not incidental to a matrimonial action, because there is no adequate relief under other statutes. *Parker v. Parker*, 335 Ill. App. 293, 81 N. E. 2d 745 (1948); 17 U. Chic. L. Rev. 200 (1949); *Campbell v. Campbell*, 200 S. C. 67, 20 S. E. 2d 237 (1942); *McClaugherty v. McClaugherty*, 180 Va. 51, 21 S. E. 2d 761 (1942). See cases under 13 A. L. R. 2d 1142.

1. Fordham, Local Government Law (1st ed. 1949), pp. 1-15; McQuillin, Municipal Corporations (3rd ed. 1949), §1.55 *et seq.*

2. New York Constitution, Art. IX, §9; *LaGuardia v. Smith*, 288 N. Y. 1, 41 N. E. 2d 153 (1942).

52 term in a case[3] brought by a taxpayer to recover taxes paid under protest. Plaintiff's business was the installation of burglar alarm devices set to mechanically transmit alarms to a central office. In a prior case[4] the Court of Appeals had ruled that this business was not the selling of telegraphic service within the meaning of §186-a of the Tax Law, and plaintiff was therefore not taxable as a utility by the City of New York. Subsequent to the initiation of that case, New York City by local law[5] framed a new definition of "telegraphic service" which specifically included plaintiff's activities. In the present action the Court of Appeals, again finding for the plaintiff, pointed out that the power of cities to tax utilities, *granted* by Tax Law §186-a, is likewise *limited* by that section and cannot be enlarged by local adoption of broad definitions. The case may serve the political function of reminding municipalities of their subordinate position in our frame of government.

There is increasing contention among reformers that the small local unit has outlived its usefulness, that it is a relic of the horse and buggy days which should be done away with.[6] These proponents of centralization, deploring the expensive duplication of services frequently occasioned by arbitrary boundaries, contend that there are only two persuasive arguments for the continued existence of local units. (1) They keep government close to the people; (2) they are a training school for democracy. These arguments are met by showing the general apathy of voters on local matters. The reformers often erroneously contrast the supposed inefficiencies resulting from the retention of a multitude of local units with the advances made over the years in science and industry. They truthfully point out that statutes which provide for cooperation between contiguous units on a permissive basis are rarely used because of the intense civic jealousy and the strong local sentiment of residents of municipalities. The State of New York has made provisions for such cooperation.[7] On the few occasions when they have been used, conflicts have not infrequently arisen between the municipalities.

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3. *Holmes Electric Protective Co. v. City of New York,* 304 N. Y. 202, 106 N. E. 2d 607 (1952).

4. *Holmes Electric Protective Co. v. McGoldrick,* 288 N. Y. 635, 42 N. E. 2d 737 (1942).

5. NEW YORK CITY LOCAL LAW 22 (1938); ADMINISTRATIVE CODE OF CITY OF NEW YORK § Q41-1.0.

6. See, *e.g.,* Snider, *The Twilight of the Township,* 41 NATIONAL MUNICIPAL REVIEW 390 (1952).

7. See, *e.g.,* COUNTY LAW § 224 (8), (9); GENERAL MUNICIPAL LAW §§ 120 *et seq.,* 121-a; HIGHWAY LAW § 194 (1); TOWN LAW § 184; VILLAGE LAW § 276.

Such an interlocal controversy was before the Court in the case of *Town of Pelham v. City of Mount Vernon.*[8] The municipalities had for many years shared equally the cost of maintenance and repair of an inter-municipal bridge. When major repairs became necessary a dispute arose as to which of two statutes was applicable. The Court held (4-3) for the defendant city, accepting its contention that the situation was governed by Highway Law §250,[9] which provides that each municipality shall pay "its just and equitable share". The dissenters, attacking flaws in the reasoning of the majority, urged that the applicable statute, as contended by plaintiff town, was County Law §61,[10] which provides for payment "in proportion to the assessed valuation of [the] city and town." This case is not of major legal significance, but it is illustrative of the type of controversy which follows from the creation of local units with broad and pervasive powers. A municipality exercising the powers granted to it almost inevitably comes into conflict with the rights and powers of others.

Community Planning

Among the powers given to municipalities are those which contemplate community planning, the most obvious of which is the zoning power.[11] The Court of Appeals during the last term had two occasions to discuss this power.

It is the law of New York that uses which do not conform to a zoning ordinance but which existed before its enactment, will, as a general rule, be permitted to continue.[12] It is frequently explained that the owner has secured a "vested" right in the particular use.[13] The rationale seems to be that the destruction of substantial structures or businesses developed prior to the ordinance is not balanced by the advantage to the public of effective zoning.[14] In *People v. Miller*[15] defendant was convicted of vio-

8. 304 N. Y. 15, 105 N. E. 2d 604 (1952), *motion for reargument denied,* 304 N. Y. 594, 105 N. E. 2d 604 (1952).

9. Now HIGHWAY LAW §232.

10. Now HIGHWAY LAW § 131-b.

11. See MCQUILLIN, *op. cit.,* §§ 25.01 *et seq.*

12. For a general discussion of what constitutes a nonconforming use, see MCQUILLIN, *op. cit.,* §§ 25.185-25.188.

13. *People ex rel. Ortenberg v. Bales,* 224 App. Div. 87, 229 N. Y. Supp. 550 (1st Dep't 1928), *aff'd without opinion,* 250 N. Y. 598, 166 N. E. 339 (1929).

14. For a discussion of a recent development in the area see 1 BFLO. L. REV. 286 (1952).

15. 304 N. Y. 105, 106 N. E. 2d 34 (1952).