DePaul Law Review

Volume 7
Issue 1 *Fall-Winter 1957*

Article 8

Redistricting Wards

DePaul College of Law

TORT LIABILITY

The cases on immunity from tort liability must be discussed with chronological reference to *Moore v. Moyle*.[38] Cases before the *Moore* decision gave immunity for various considerations.[39] The *Moore* case represents the modern trend away from charitable immunity.[40] It held that a judgment against a charitable institution was valid but could not be satisfied by trust funds. Therefore, charitable institutions are liable to the extent that they have liability insurance.[41]

CONCLUSION

It appears that the most notable development in the law of charitable trusts is in the field of tort liability. The distinction between *cy pres* and equity's inherent powers poses the problem of which to apply. Some courts have been reluctant to apply *cy pres* while others apply it very liberally, arriving at the same result but leaving doubt as to the propriety of its application. Strict conformance with the tax exemption statutes set requirements of (1) ownership by a charitable organization and (2) exclusive use for charitable purposes. The public benefit attributed to charitable trusts makes the law pertaining thereto a matter of increasing concern.

[38] 405 Ill. 555, 92 N.E. 2d 81 (1950).

[39] Meyers v. Y.M.C.A. 316 Ill. App. 177, 44 N.E. 2d 755 (1942). In Lenahen v. Ancilla Domini Sisters, 331 Ill. App. 27, 72 N.E. 2d 445 (1947), immunity was based on considerations of public policy and on the theory that respondeat superior did not apply.

[40] See Bing v. Thunig, 2 N.Y. 2d 656, 163 N.Y.S. 2d 3 (1957), noted in 7 DePaul L. Rev. 131 (1957) infra.

[41] Tracy v. Davis, 123 F. Supp. 160 (E.D. Ill., 1954) which held that the existence of trust funds need not be alleged in a complaint. The district court reiterated the fact that immunity such as it exists is not immunity to liability, but rather to execution of the judgment on trust funds; Slenker v. Gordon, 344 Ill. App. 1, 100 N.E. 2d 354 (1951); Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E. 2d 342 (1947).

REDISTRICTING WARDS

"Ward" is of teutonic origin and has a variety of meanings all of which spring from the general idea of a military guard or protector. Thus, a person elected from such section is considered a protector of a geographical part as distinguished from the city as a whole.[1]

Wards do not possess any power of local self-government, and are erected exclusively for the purpose of securing representation in the city government. The method of determining the number and the manner of

[1] Hammond v. Young, 117 N.E. 2d 227, 231 (1953).

fixing such subdivisions may be prescribed by statute or by charter.[2] Frequently such power is conferred upon the municipal corporation by the legislature of the state.[3] Such a confirmation of power is not questioned generally, as the legislature can and usually does require the division of a city into wards to be done by persons not of its own membership. Any appropriate existing board of public officers might be selected for the purpose.[4] Sometimes the question of the division of wards is determined by a vote of the local electorate[5] and other times by a court.[6] However, in any of these methods, the power to act must come from legislative authority and without such authority, the municipal legislature, or whatever method is used, cannot act.[7]

The legislature may specify what standards are to be used on redivision,[8] or may grant partial discretion as to certain matters therewith,[9] or grant complete discretion to the local government.[10]

A city council, although intrusted with discretionary powers, may fail to redistrict at the proper time. In *State ex rel Ingold v. Mayor and Common Council of City of Madison*, wherein the council had not been able to arrive at a determination as to the proper redistricting of the city, the court stated:

[2] A typical statute: Ill. Rev. Stat. (1955) c. 24, §§ 21–36. The city of Chicago shall be divided into fifty wards. In the formation of wards the population of each shall be as nearly equal as practicable and each shall be composed of contiguous and compact territory; Ill. Rev. Stat. (1955) c. 24, §§ 21–38. On or before the first day of December, of the year following the year in which the national census is taken, and every ten years thereafter, the city council shall by ordinance redistrict the city on the basis of the national census of the preceding year. All elections of aldermen shall be held from the existing wards until a redistricting is had as provided for in this article; Ill. Rev. Stat. (1955) c. 24, §§ 21–38.

[3] People v. Young, 38 Ill. 490 (1865). Accord: Granger v. Minneapolis, 182 Minn. 147, 233 N.W. 821 (1930); State ex rel Comstock v. Stewart, 52 Neb. 243, 71 N.W. 998 (1897); State ex rel Childs v. Darrow, 65 Minn. 419, 67 N.W. 1012 (1896); People v. Danville, 147 Ill. 127, 35 N.E. 154 (1893).

[4] Miller v. Chicago, 348 Ill. 34, 180 N.E. 627 (1932); Granger v. Minneapolis, 182 Minn. 147, 233 N.W. 821 (1930); Fitzgerald v. Curley, 220 Mass. 503, 108 N.E. 355 (1915); State ex rel Neacy v. Milwaukee, 150 Wis. 616, 138 N.W. 76 (1912).

[5] Swindle v. State, 143 Ind. 153, 42 N.E. 528 (1895).

[6] Tyronne Bourough, 13 Pa. C. 651 (1893). Accord: Latrobe Borough, 33 Pa. C. 611, 612 (1907): "Strictly, the court is without authority to redivide a borough into wards, but, as it has the power to erect new wards, to divide any ward or to alter the lines of any two or more adjoining wards, indirectly, it can lawfully redivide a borough into wards."

[7] People v. Young, 38 Ill. 490 (1865).

[8] Osgood v. Clark, 26 N.H. 307 (1853).

[9] Grimmell v. Des Moines, 57 Iowa 144, 10 N.W. 330 (1881).

[10] People v. Danville, 147 Ill. 127, 35 N.E. 154 (1893).

The statute makes it mandatory upon the common council to make a new ward in the city. . . . It leaves open as a matter of discretion only the manner in which such new ward shall be created. . . . The writ herein does not attempt to control or regulate the manner in which the common council shall exercise that discretion, but only effectuates the mandate of the statute. Where there is a plain duty, as here involved, it is a well-recognized and long-established doctrine that compliance therewith may be enforced by mandamus.[11]

Mandamus is a proper remedy to compel a city council to perform its mandatory duties prescribed by the charter or statute. The writ, however, may not compel an officer to perform the duties in a particular way. It will be issued only to require the performance of ministerial duties. The exercise of discretion on the part of such an officer will not be interfered with in that proceeding except for arbitrary disregard of the law or for flagrant abuse of discretion.[12] Therefore, mandamus is the proper remedy to compel the performance of a duty devolving upon municipal authorities by statute.[13]

Should the city council act to redistrict the wards, their motives in exercising their discretion will not, as a general rule, be made the subject of inquiry by the courts,[14] since the legislature intrusted the duty and responsibility of redistricting to the judgment and discretion of the city council.[15] Therefore, unless the complainant can show actual loss of property or that the action is unreasonable and arbitrary, he cannot enjoin the city from redistricting the wards. In a bill to restrain the city from so

[11] 170 Wis. 133, 134, 174 N.W. 471, 472 (1919).

[12] Beckman v. Talbot, 278 N.Y. 146, 15 N.E. 2d 556 (1938). Accord: Comer v. Epps, 149 Ga. 57, 99 S.E. 120 (1919); Leftridge v. Sacramento, 59 Cal. App. 2d 516, 139 P. 2d 112 (1943); cf. American Distilling Co. v. City Council of Sausalito, 34 Cal. 2d 660, 666, 202 P. 2d 125, 129 (1949), wherein the court stated: "While the courts are loath to interfere with the legislative process, they must interfere when the legislative body is acting without power or refuses to obey the plain mandate of law." The court continues at page 130: "The rule is stated in 4 Dillon, Municipal Corporations, 5th ed., pp. 2648, 2657, thus: 'A writ of mandamus will, where it is an appropriate remedy, be granted against municipal corporations and their officers whenever they refuse or unreasonably neglect to perform any duty clearly enjoined upon them by charter, or statute, or law, and there is no ordinary or specific legal remedy adequate to enforce the right of the public, or the particular legal right of the relator. The general rule is this: If the inferior tribunal, corporate body, or public agent or officer has a discretion, and acts and exercises it, this discretion cannot be controlled by mandamus. But if the inferior tribunal, body, officers, or agents refuse to act in cases where the law requires them to act, and the party has no other legal remedy, and where, in justice, there ought to be one, a mandamus will lie to set them in motion, to compel action; and, in proper cases, the court will settle the legal principles which should govern, but without controlling the discretion of the subordinate jurisdiction, body, or officer.' "

[13] Fort Meade v. State ex rel Rose, 120 Fla. 177, 162 So. 350 (1935); cf. Morris and Cummings Dredging Co. v. Bayonne, 75 N.J.L. 59, 67 Atl. 20 (1907).

[14] Tribune Co. v. Thompson, 342 Ill. 503, 174 N.E. 561 (1930).

[15] Miller v. Chicago, 348 Ill. 34, 180 N.E. 627 (1932).

doing, on grounds that it would result in a waste of the taxpayers' money, the Illinois Supreme Court stated:

> It is a general, well-established, and recognized rule in this state that the jurisdiction of a court of equity pertains only to the maintenance of civil, personal, and property rights and that it has no jurisdiction over matters or questions of a political nature unless civil property rights are involved.[16]

Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. Civil rights are those which have no relation to the establishment, support or management of the government. These consist in the power of acquiring and enjoining property, of exercising the paternal and marital powers, and the like.[17] The distinction between civil rights and political rights is stated in *Sheridan v. Colvin*:

> [The] . . . subject matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property.[18]

The conclusion is, therefore, that unless personal or property rights are involved, or the result obtained by the exercise of the council's discretion, is so capricious or arbitrary so as to be unreasonable, a court of equity will not intervene and declare the act invalid.[19]

In the exercise of the council's discretion, equal population distribution, which is often required by statute,[20] and natural boundaries are to be considered in the redivision of the wards:

[16] Ibid., at 35 and 628.

[17] Board of Education v. Board of Education, 11 Ill. App. 2d 408, 137 N.E. 2d 721 (1956).

[18] 78 Ill. 237, 247 (1875).

[19] Miller v. Chicago, 348 Ill. 34, 180 N.E. 627 (1932). As a general rule a court of equity will not enjoin a municipal legislative body from exercising legislative powers, even though its action may be unconstitutional or ultra vires, and persons aggrieved by such action are remitted to the remedies available after the legislative function has been exercised. Ehrlich v. Wilmette, 361 Ill. 213, 197 N.E. 567 (1935); Roby v. Chicago, 215 Ill. 604, 74 N.E. 768 (1905); Chicago v. Evans, 24 Ill. 52 (1860). An exception would be where the proposed action of the council violates a law which prohibits adoption of such an ordinance, as distinguished from mere ultra vires action. Connell v. Baton Rouge, 153 La. 788, 96 So. 657 (1922), or where the mere adoption will work irreparable damage beyond the remedy of an injunction sought after the adoption of the ordinance. People ex rel. Negus v. Dwyer, 90 N.Y. 402 (1882).

[20] Authority cited note 2 supra.

The mandate of the statute is not that the population of each ward shall be equal but "as nearly equal as practicable." Manifestly, in dividing the city into wards many elements enter, such as natural or artificial dividing lines, rivers, transportation facilities, the use of well-known streets, the congruity or incongruity of the population, and are properly given consideration. . . . The redistricting of the city into wards is a legislative power conferred by the statute upon the city council. From the nature of the power to be exercised and from the language of the act it is evident that it was not the intention or expectation of the legislature that the division into wards should be made by the council with mathematical exactitude as to population but that variations therefrom were intended to be left to the practical exercise of sound discretion of the council upon a consideration of the varying elements and difficulties entering into the task.[21]

Thus, equity will not enjoin the acts of a city council in the use of their granted legislative discretion unless the circumstances previously enumerated exist. Nor will quo warranto test the use of discretion as such by the municipal council.[22] Quo warranto is a demand by the state upon some individual or corporation, municipal or otherwise, to show by what right it exercises some franchise or privilege concerning the state, which allegedly cannot legally be done because of the constitution or the law of the forum, unless by virtue of a grant of authority from the state.[23] In other words, quo warranto applies to the right of a person or corporation to exercise the function of public office; and not to the validity of the acts of that office as such, let alone to the discretion used in such acts.[24]

Although certiorari has been used to test the *validity* of a council's action,[25] it does not lie to review the exercise of discretion.[26] A body, municipal or otherwise, to which power has been intrusted, does not exer-

[21] Miller v. Chicago, 348 Ill. 34, 38, 180 N.E. 627, 629 (1932). Accord: People ex rel Boyle v. Cruise, 197 App. Div. 705, 189 N.Y.S. 338 (1921), aff'd 231 N.Y. 639, 132 N.E. 920 (1921); Moore v. Georgetown, 127 Ky. 409, 105 S.W. 905, 906 (1907): "It is true that fair representation and equal apportionment is a valuable privilege, and one that should be adhered to; but, when the legislative department of the state that created these municipalities and provided an elaborate plan for their government failed to adopt either directly or by implication any scheme to regulate or control them in the selection of their legislative boards, we do not feel that the courts are warranted in interfering with the discretion lodged in the people of these cities and their representatives whose duty it is to divide the city into wards."

[22] Generally speaking, quo warranto proceedings are of a legal nature. People v. White Circle League of America, 408 Ill. 564, 97 N.E. 2d 811 (1951).

[23] State v. Perkins, 138 Kan. 899, 28 P. 2d 765 (1934); State v. Harris, 3 Ark. 570 (1841).

[24] Smith v. Dillon, 267 App. Div. 39, 44 N.Y.S. 2d 719 (1943); Paten v. Miller, 190 Ga. 123, 8 S.E. 2d 757 (1940).

[25] It was held in New Jersey that citizens whose domiciles have been changed by a resolution of the council altering the ward limits of the city may bring certiorari to test the validity of the action of the council. State v. Bayonne, 54 N.J.L. 125, 22 Atl. 1006 (1891).

[26] City of Harvey v. Dean, 62 Ill. App. 41 (1895).

cise judicial action merely because it is vested with discretion, or may exercise judgment. Almost all ministerial officers are intrusted with some degree of discretion, and all legislative bodies not only use discretion but also judgment in whatever they do.[27]

When a writ of certiorari is issued for the purpose of reviewing the proceedings of a municipality, it is for the purpose only of determining the legality of the proceedings reviewed, and the judgment will be whether that proceeding is valid or invalid, not whether it was wise or discreet,[28] and only those proceedings which are judicial or quasi-judicial in nature will be reviewed.[29] As the leading case of *Fitzgerald v. Curley* states:

> The essential character of the establishment of the municipal subdivisions of cities known as wards, when undertaken either by the Legislature itself or through deputies named by it, is political and not judicial. It is an adminstrative aspect of a legislative function which under our plan of government may be conferred upon subordinate officers. But the nature of the act is not changed by its being performed through a delegated instrumentality selected by the legislature rather than by the legislature itself. The determination of that number of wards between the limits named in this statute and the division of the territory of the city into the number of wards, having regard to the natural configuration wraught by the harbor, inlets of the sea and rivers, and other well defined boundaries, so as to contain within reasonable limits of variation an equal number of voters, is not a judicial act. It demands a careful study of local conditions and the exercise of sound judgment. But it is administrative or political, not judicial or quasi-judicial in character. The discretion of the city council in performing such a duty is not subject to review by this court upon a writ of certiorari. That process is available only for the purpose of examining and correcting the errors of law manifest upon the record of some tribunal in its performance of judicature, and to restrain the excesses of jurisdiction of inferior courts or officers acting judicially.[30]

Thus, from the foregoing it can be seen that when a municipality has been imbued, by the legislature of the state, with discretionary powers to redistrict the wards, and fails to do so, a writ of mandamus can be used to compel them to act. However, once they do act, the courts will not inquire into the motives or use of that discretionary power unless it is flagrantly abused or injures property.

As has been stated, the purpose of dividing the municipal area into wards or subdivisions is to give each and every part of the city representa-

[27] Ibid.

[28] Hyslop v. Finch, 99 Ill. 171 (1881).

[29] State v. Albritton, 251 Ala. 422, 37 So. 2d 640 (1948); City of Harvey v. Dean, 62 Ill. App. 41 (1895). Accord: Birchwood Knolls, Inc. v. Hunter, 144 N.Y.S. 2d 606 (1955); Appeal of Common School Dists. Nos. 27, 20, 5 and 3, Faribault County, 232 Minn. 342, 45 N.W. 2d 657 (1951); Rhode Island Home Builders v. Hunt, 74 R.I. 255, 60 A. 2d 496 (1948); Stacy v. Haverhill, 316 Mass. 759, 57 N.E. 2d 564 (1944).

[30] 220 Mass. 503, 108 N.E. 355 (1915).

tion. For example in Illinois, some cities have adopted the "City Election Law" whereby they can form their own election precincts or districts:[31]

> for city elections the city council, and not the county board, should establish the boundaries of the election precincts or districts . . . but that in such cities for city elections the ward lines must necessarily be considered in forming election districts. As a practical matter in carrying on and conducting a city election where the city is divided into wards, we do not see how it can be reasonably argued that the ward lines can be ignored in forming and fixing the boundaries of election districts or precincts, otherwise it would be impossible to elect the aldermen.[32]

Furthermore it would be unreasonable to cross ward lines in forming the boundary lines if an election district though such ward may be divided into several districts or precincts,[33] and in which case the voter must have resided in the precinct thirty days before election.[34] Then it would be likely that when wards are redistricted the voting precincts would also have to be redistricted so as not to cross into other wards. Should the wards be redistricted within thirty days before an election, and as a result, the precincts were redistricted within thirty days prior to an election, this would not invalidate the election,[35] although the likelihood of such an occurrence would be slight;[36] and since a thirty-day residence is required in the precinct in order to vote[37] the court would not be justified in holding the votes to be illegal because of the change of the districts.[38]

In case a new election district should be formed for the organization of a new town or ward or the incorporation of a city or town, the judges or inspectors of the election in the new district formed should make their registry of electors,

[31] Ill. Rev. Stat. (1955) c. 46, § 6.

[32] People v. Graham, 267 Ill. 426, 430, 108 N.E. 699, 701 (1915).

[33] The terms "district" or "precinct" have been used interchangeably. The meaning of those words must be gathered very largely from the connection in which they are used in each instance. People v. Markiewicz, 225 Ill. 563, 80 N.E. 256 (1907). A district is a division of a territory made for administrative, electoral, or other purposes, and an election district has been generally supposed to mean the territory constituting a voting district or precinct. Donovan v. Comerford, 332 Ill. 230, 163 N.E. 657 (1928).

[34] People v. Graham, 267 Ill. 426, 108 N.E. 699 (1915); Welch v. Shumway, 232 Ill. 54, 83 N.E. 549 (1907). Consult Ill. Rev. Stat. (1955) c. 46, §§ 6–27.

[35] People v. Quilici, 309 Ill. App. 466, 33 N.E. 2d 492 (1941).

[36] Consult Ill. Rev. Stat. (1955) c. 46, § § 11–1 and 6–16; Welch v. Shumway, 232 Ill. 54, 83 N.E. 549 (1907). It is to be noted at this point that it would be extremely unlikely that an election would be held within thirty days of redistricting in the City of Chicago due to Ill. Rev. Stat. (1955) c. 24, §§ 21–39 which provide for the city council to submit the proposed ordinance of redistricting to a popular vote at the next election to be held in the city.

[37] Ill. Rev. Stat. (1955) c. 46, §§ 6–27.

[38] Welch v. Shumway, 232 Ill. 54, 83 N.E. 549 (1907).

which should embrace the names of such persons as were known to the electors in their district.[39]

In fact, the thirty-day residence requirement would probably be interpreted as directory only, for where a statute does not declare the performance of certain duties by public officials in connection with the election to be essential to the validity of the election, it will be regarded as mandatory if such matters affect the real merits, but will be considered directory only, and not vital to the election, unless they are such, in themselves, as to change or render doubtful the result.[40]

As a result of the aforementioned, it can be deduced that the altering of ward boundaries will have little affect upon the legality of an election so long as the precincts are not part of more than one ward.

The most important thing about redistricting wards *is to redistrict the wards,* and secure as practicably as possible, equal population in each ward so as to secure equal representation, as well as an equal vote, in the affairs of the municipal government.[41]

[39] Donovan v. Comerford, 332 Ill. 230, 233, 163 N.E. 657, 658 (1928).

[40] People ex rel. Agnew v. Graham, 267 Ill. 426, 108 N.E. 699 (1915).

[41] Hammond v. Young, 117 N.E. 2d 227 (1953).

WIRE-TAP EVIDENCE: AN AREA OF ADMISSIBILITY?

The admissibility or inadmissibility of wire-tap evidence is a much discussed topic. Inasmuch as the United States Supreme Court has favored the exclusion of this type of evidence, that is the rule followed in the federal courts today.[1] Those who favor the inadmissibility of wire-tap evidence contend that federal legislation such as Section 605 of Title 47,[2] and the interpretation given it by the United States Supreme Court[3] were necessary to protect the individual's right of privacy. It is well established that privacy is the thing which is being protected and that the divulgence of wire-tapping data is an invasion of privacy.[4] On the other hand, though such protection of privacy is necessary it should not, and Congress did not intend it to, hamper or obstruct the exercise of the governmental police powers.

The *Nardone* case sets forth what is the basic problem:

It is urged that a construction be given the section (605) which would exclude federal agents since it is improbable Congress intended to hamper and impede the activities of the government in the detection and punishment of

[1] Nardone v. United States, 302 U.S. 379 (1937).

[2] 48 Stat. 1103 (1934), 47 U.S.C.A. § 605 (Supp., 1956).

[3] Nardone v. United States, 302 U.S. 379 (1937).

[4] Goldman v. United States, 316 U.S. 129 (1942); Diamond v. United States, 108 F.2d 859 (C.A. 6th, 1938); Accord: 41 Am. Jur., Privacy § 29 (1942).