MUNICIPAL CORPORATIONS

SUPREME COURT REVIEW

GOVERNMENTAL IMMUNITY

The Nebraska Supreme Court reaffirmed in *Hall v. Abel Investment Co.*[1] that the common law rule of governmental immunity has not been completely abrogated in Nebraska.[2]

The amended petition in this case had alleged that the City of Lincoln, Nebraska, falsely represented to the plaintiff that it required six lots owned by him for the purpose of constructing a street and a paving repair facility. The petition elaborated by stating that the city used its power of eminent domain to acquire a portion of the land with the specific intention of reselling it to Abel Investment Company at a higher price.[3]

Instead of seeking recission of the sale, however, the plaintiff sought damages. The damages represented the difference between the amount paid to him by the city and the amount for which the city resold the property.[4]

The court noted that the Political Subdivisions Tort Claims Act[5] limits the tort actions which may be brought against political subdivisions. Specifically, the act excludes actions for misrepresentation and deceit.[6] Judge Clinton further explained that the basic flaw in the plaintiff's argument was that he was not entitled to the relief prayed for. The request for damages in the form of additional compensation for the property would amount to affirmation of the contract, whereas the plaintiff's remedy was having the conveyance set aside.[7]

CONTRACTS BETWEEN SCHOOL BOARDS AND BOARD MEMBERS

In *Davy v. School Board of Columbus*,[8] the Nebraska Supreme Court considered the legality of a contract for the sale of real estate

1. 192 Neb. 256, 219 N.W.2d 760 (1974).
2. *Id.* at 257, 219 N.W.2d at 760.
3. *Id.* at 256, 219 N.W.2d at 760.
4. *Id.* at 257, 219 N.W.2d at 761.
5. NEB. REV. STAT. § 23-2401 *et seq.* (Reissue 1970).
6. NEB. REV. STAT. § 23-2409(5) (Reissue 1970) states:
The provisions of this act shall not apply to . . . [a]ny claim arising out of assault, battery, false arrest, false imprisonment, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
7. 192 Neb. at 258, 219 N.W.2d at 761.
8. 192 Neb. 468, 222 N.W.2d 562 (1974).

to a school board by a member of that board. The court held the contract void, and established what appears to be a new rule involving transactions between school districts and board members.

The case arose when the petitioner initiated an action pursuant to section 79-442 of the Nebraska statutes,[9] requesting that the school district be allowed to keep the land involved and also recover the purchase price from the seller. The request was based upon the court's earlier interpretations of section 79-442 and similar statutes. In those cases, the school districts or municipal corporations involved had been entitled to keep the property and also recover the purchase price.[10]

Agreeing with the petitioner's basic contention, the court explained that the prohibition of transactions between school boards and board members is reflective of a sound public policy—the insurance of honest and efficient government.[11] And because of that public policy, recovery by the conveyor on the basis of quantum meruit would also be denied in instances covered by section 79-442 of the Nebraska statutes.

The court then stated, however, that denial of recovery on quantum meruit grounds for services performed or materials furnished is not the equivalent of holding that the governmental entity is in all cases entitled to keep the benefit of the unauthorized contract and also recover the consideration paid.[12] Judge Clinton distinguished the earlier cases from the present one by pointing out that all of the earlier controversies involved materials or labor

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9. NEB. REV. STAT. § 79-442 (Reissue 1971) states:

> Except as provided in section 70-624.04, no school officer shall be a party to any oral or written contract for building, furnishing supplies, or services in amounts in excess of two thousand dollars in any one school year, and no contract may be divided for the purpose of evading the requirements of this section.

10. *See*, Arthur v. Trindel, 168 Neb. 429, 440-41, 96 N.W.2d 208, 216 (1959), and Hesse v. Wenke, 161 Neb. 311, 316, 73 N.W.2d 223, 226-27 (1955).

11. A brief explanation of the public policy and denial of recovery was included in Village of Bellevue v. Sterba, 140 Neb. 744, 747, 1 N.W.2d 820, 821 (1942). Bellevue sought, in that case, to recover from Sterba money paid contrary to the prohibition of a statute similar to the one involved here. Sterba urged that even if the contract was void, he should still be entitled to the reasonable value of his service. The court responded to his contention by stating:

> This section has a salutory purpose, the insuring of honest and efficient government. The prohibition against an officer of a village entering into contracts with the village is clear. It is urged, however, that Sterba was entitled under the law to recover for the reasonable value of the services he rendered the city. With this we cannot agree. Such a rule would defeat the very purpose of the statute.

12. 192 Neb. 468, 472-73, 222 N.W.2d 562, 565 (1974).

which had been incorporated into an improvement and which were incapable of being returned. In contrast, the property in the present case was still intact, unimproved and capable of being returned.[13]

The court then turned to common law principles regarding the sale of real estate and noted that the general rule is that where a party seeks to rescind a void contract (or one merely voidable), he "must restore or offer to restore the consideration or whatever he must receive under the contract. The rule is not absolute and is not to be strictly construed where restoration is impossible. The rule is to be applied in accordance with equitable principles."[14] The court also relied upon the general rule that "a purchaser of land who is entitled to cancel must restore possession and title,"[15] and upon two early Nebraska cases.[16]

In the end, the court evaded interpreting section 79-442 of the Nebraska statutes. Explaining that public policy considerations dictated the denial of compensation on the basis of quantum meruit, the court nevertheless found that common law principles took precedence over public policy considerations, so compensation would be allowed.

The court ultimately found the contract void upon separate, unspecified public policy principles, but held that the parties should maintain their status quo unless the land involved was changed or unless some other reason could compel them to reconvey title.[17]

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13. *Id.*

14. *Id.* at 473, 222 N.W.2d at 565, *citing* 17A C.J.S. *Contracts* § 439 (1963).

15. *Id., citing* 12 C.J.S. *Cancellation of Instruments* § 44 (1938).

16. Langdon v. Loup River P.P. Dist., 139 Neb. 296, 297 N.W. 557 (1941), and Bowen v. Johnson, 129 Neb. 868, 263 N.W. 215 (1935).

Bowen dealt with tender and cancellation of a mortgage. The court noted:

> [b]efore a court of equity will cancel an assignment of a mortgage secured by fraud, it will require a return of the consideration so that the assignee will be placed in substantially the same position as when the instrument was executed.

129 Neb. at 871, 263 N.W.2d at 217.

In *Langdon* the court considered the question of tender in an action to have an option for a permanent easement declared null and void. Plaintiff tendered return of the option, but defendant refused. The rule, according to the court was:

> in an action in equity for recission or cancellation, the failure to return or offer to return the consideration will not preclude relief where the consideration is merely money paid, the amount of which can be credited in partial cancellation of the injured party's claim, and where it is patent that a tender, if made, would be rejected.

139 Neb. at 300, 297 N.W. at 559.

17. 192 Neb. 468, 474-75, 222 N.W.2d 562, 566 (1974).

ATTACHMENT TO ANOTHER DISTRICT

Friesen v. Clark[18] was a decision limited to its peculiar factual situation.

The case involved a petition requesting that an 80 acre tract of land be set off from the McCool School District No. 83 and attached to the Henderson School District No. 95, in York County, Nebraska. All statutory prerequisites for maintaining an action had been satisfied, so the court found the only issue to be whether or not there was a sufficient showing that the transfer would be in the best *educative* interest of the student involved. (emphasis added)[19] The "best educative interest" test had been established earlier by the court in *Roy v. Bladen School Dist. No R-31*,[20] and in *McDonald v. Rentfrow*.[21]

LEGISLATION

During the survey period, numerous bills of varying importance were passed dealing with municipal corporations and their management. In response to a growing national awareness of the finite quality of natural resources, L.B. 577 was enacted in hope of conserving the state's ground water supply.[1] Under this bill, the director of water resources of a particular natural resource district is given the power, after a public hearing, to declare a segment of his district a control area.[2] This designation restricts the use of ground water in the area for a period of time through a system of rules and regulations which may be promulgated by the district.[3]

18. 192 Neb. 227, 220 N.W.2d 12 (1974).

19. NEB. REV. STAT. § 79-403(1) (Reissue 1971) outlines the basic criteria for transfer of land from one school district to another. Briefly, the petition must show: 1) ownership of the land by the petitioner or petitioners; 2) location of the land in a district adjoining the one to which attachment is sought; 3) that school children reside on the land with parents or guardians; and 4) that petitioner or petitioners reside within certain distances of the respective school houses or bus lines, or that they reside in a Class I or Class II district and own not less than 80 acres of land in an adjoining equal or higher class district.

20. 165 Neb. 170, 181, 84 N.W.2d 119, 125 (1957).

21. 176 Neb. 796, 805, 127 N.W.2d 480, 486 (1964).

1. L.B. 577, [1975] Laws of Neb. 1145, *amending* NEB. REV. STAT. §§ 46-602, 46-603, 46-629, and 47-630 (Reissue 1974).

2. *Id.* § 3, at 1146-47.

3. *Id.* § 8, at 1149-50.

Two express powers are given the district. The district may require reports from ground water users when necessary.[4] The district may also implement an application process with which one must comply as a condition precedent to constructing a well within the control area.[5]

In a related area, section 16-673 of the Nebraska statutes was amended to permit the mayor and city council of any city of the first class to make contracts for the city with any person, company or association to provide the city with utility service.[6] Prior to this particular amendment, any contract of this nature could be entered into only after public approval by the electors of the city.[7]

Probably the most controversial bill of the entire legislative session related to the management of municipal corporations. L.B. 423, passed over the governor's veto, amended section 79-1003 of the statutes, to provide for district-wide election of school board members in fifth class school districts.[8]

An extensive revision of many of the Nebraska statutes relating to the operation of elections was passed during the last session. Of particular importance were the amendments and additions to section 32-1241 of the statutes that provide for an automatic state-financed recount of certain electoral contests ending in a given degree of closeness.[9]

Several noteworthy bills were passed relating to municipal land

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4. *Id.*

5. *Id.* §§ 4-7, at 1148-49.

6. L.B. 67, [1975] Laws of Neb. 149, *amending* NEB. REV. STAT. § 16-673 (Reissue 1974).

7. *See* NEB. REV. STAT. § 16-673 (Reissue 1974).

8. L.B. 423, [1975] Laws of Neb. 869, *amending* NEB. REV. STAT. § 79-1003 (Reissue 1971).

9. L.B. 453, [1975] Laws of Neb. 914, *amending* NEB. REV. STAT. § 32-1241 (Reissue 1974).

In section 23 it is provided that a recount may be made in primary elections:

> [f]or United States Senator, Representative in Congress, or any state or district officer or any other candidate who files his application for nomination with the Secretary of State, or any county, district, municipal, school, or other candidate who filed his application for nomination with the county clerk or election commissioner . . . .

will be entitled to a recount if the candidate nominated fails to win by a margin of less than two percent of the total votes cast for that specific office. In the general election, a recount will be effected if the victorious candidate wins by a margin of one and one-half percent or less of the total votes cast for that office. It should be noted that this recount provision can be stopped by the losing candidate only through a written statement made to the person with whom he made his filing, stating that he does not desire a recount. L.B. 453, § 23 [1975] Laws of Neb. 938.

use control. Evidencing an increasing trend toward regional land use planning is L.B. 317, which authorizes the county government of a county that is included in a standard metropolitan statistical area, with the assistance of its planning commission, to prepare, adopt and enforce zoning and subdivision regulations in accordance with a comprehensive plan.[10] If the state office of planning and programming determines that a city of the first or second class is not, by July 1, 1977, enforcing zoning and subdivision controls in a manner that the state agency determines to be adequate, the municipality shall lose its land use control powers.[11]

Also included in the land use control area is L.B. 151, which supplies a procedural mechanism through which the owners of real estate within a county industrial area can petition the municipality for voluntary exclusion from the area.[12] As a result of L.B. 108, any artificial obstruction on any floodway or floodplain within the state is now considered a public nuisance.[13] Under the authority of this bill the Director of Water Resources is given the power to enjoin or abate an obstruction already determined to be a public nuisance.[14] Finally, L.B. 117 amends section 16-230 of the statutes to enable a city of the first class, by ordinance, to prohibit and control the depositing or accumulation of litter on any piece of ground within the city limits.[15]

10. L.B. 317, § 1, [1975] Laws of Neb. 640-41.
11. *Id.*
12. L.B. 151, § 1, [1975] Laws of Neb. 310. It should also be noted that the same procedure can be employed by landowners to ask for voluntary termination of an industrial area classification.
13. L.B. 108, § 4, [1975] Laws of Neb. 233, *amending* NEB. REV. STAT. § 2-1506.14 (Reissue 1974).
14. *Id.*
15. L.B. 117, § 1, [1975] Laws of Neb. 253, *amending* NEB. REV. STAT. § 16-230 (Reissue 1974).