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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.
The **City** of **Parma, Ohio** et al, APPELLEES,
v.
The **City** of **Cleveland**, Ohio et al, APPELLANTS.
NO. 45314.

February 11, 1983.

APPEAL FROM COMMON PLEAS COURT No. 039,984.

For plaintiff-appellees: Stephen P. Bond.

For defendant-appellants: Richard F. Horvath and Donald F. Black.

For defendant-appellee Northeast Ohio Regional Sewer District: William B. Schatz.

JOURNAL ENTRY AND OPINION

JACKSON, J.

*1 This cause came on to be heard upon the pleading and the ..... transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

SEE OPINION, JACKSON, J., ATTACHED HERETO AND INCORPORATED BY REFERENCE

This cause is reversed and judgment entered in favor of appellant, City of Cleveland.

It is, therefore, considered that said appellant(s) recover of said appellee(s) costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, P.J., CONCURS

MARKUS, J., CONCURS IN PART AND, DISSENTS IN PART (See Concurring and Dissenting Opinion attached to Journal Entry and Opinion).

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

The City of Parma, Ohio, et al, Plaintiff-Appellees,
v.
The City of Cleveland, Ohio, et al,
Defendant-Appellants.
NO. 45314.
Court of Appeals of Ohio, Cuyahoga County.
February 11, 1983.
For Plaintiff-Appellees: Stephen Bond Chief Assistant Law Director Parma City Hall 6611 Ridge Road Parma, Ohio 44129.

For Defendant-Appellants: James E. Young John D. Maddox Donald F. Black Richard F. Horvath Room 106 - City Hall 601 Lakeside Avenue Cleveland, Ohio 44114.
For Defendant-Appellee Northeast Ohio Regional Sewer District: William B. Schatz Cleveland Plaza - 5th Floor 1127 Euclid Avenue Cleveland, Ohio 44115.

PER CURIAM

OPINION

SYLLABUS

1. The Court of Common Pleas has original and exclusive jurisdiction to interpret the charter of a regional sewer district organized pursuant to Chapter 6119, O.R.C.

2. A lawsuit for declaratory judgment may be brought in the Court of Common Pleas to determine the territory to be included in a regional sewer district for purposes of representation on the district's Board of Trustees, within the meaning of the charter forming the sewer district. An action in quo warranto need not be brought under these circumstances because the right of any specific individual to hold public office is incidental to the question of the correct interpretation by the charter.

This is a lawsuit for declaratory judgment and injunction brought by the City of Parma and the Suburban Council of Governments against the City of Cleveland, Cleveland's Mayor, and the Northeast Ohio Regional Sewer District. The issue for determination by this Court of Appeals is to define the area which comprises the Sewer District and is entitled to representation on the Board of Trustees.

***2** Pursuant to Chapter 6119 of the Ohio Revised Code, the Court of Common Pleas has exclusive and original jurisdiction to approve a petition for creation of a regional sewer district, to determine the provisions of the petition or charter [FN1] of the sewer district, to determine the territory to be served by the sewer district, and, in subsequent proceedings, to add territory to the sewer district and to amend provisions of the charter. R.C. 6119.02 - 6119.051.

FN1 The parties seeking to form the sewer district file a petition for its establishment. Other interested parties may file objections to the petition. It is the duty of the court to modify provisions of the petition so as to render it "economical, feasible, fair, and reasonable." R.C. 6119.04. The petition, as finally approved by the Court of Common Pleas, serves as the charter for the sewer district.

In order to crystalize the issue which the parties have petitioned this court to resolve, a brief statement of the historical background of this controversy is in order.

The Regional Sewer District came into existence as the result of litigation among state, county, and local office, in the early 1970's. In September, 1970, the Ohio Water Pollution Control Board brought suit against the City of Cleveland for discharging pollution into state waters. The Cuyahoga County Court of Common Pleas granted an injunction enjoining the City of Cleveland from issuing sewer permits or making new sewer connections without the approval of the State Water Pollution Control Board.

In December, 1970, the City of Cleveland filed a third party complaint against 34 suburban communities, seeking to enjoin them from diverting pollution into the treatment plants of the City of Cleveland.

In March, 1971, 21 suburban municipalities filed a complaint against the City of Cleveland, alleging that the City was assessing unlawful charges against the suburbs for sewerage treatment.

The Cuyahoga County Commissioners thereupon filed a petition under Chapter 6119 of the Revised Code to create the Cleveland Regional Sewer District. The petition was approved by the trial judge of the Cuyahoga County Common Pleas Court and the regional sewer district was created by journal entry filed June 15, 1972, pursuant to R.C. Chapter 6119. Liability of Cleveland and thirty-eight suburbs participated in this proceeding.

The creation of the Sewer district was intended to resolve the litigation among authorities, by placing responsibility for the sewer system in the hands of a separate political entity. The administration of the City of Cleveland in 1972 did not contest the judgment of the Common Pleas Court by appeal to this court.

Section 6 of the petition or charter approved by the Common Pleas Court in 1972 generally defines the area of the Sewer District and establishes two subdistricts: Subdistrict 1 (the City of Cleveland) and Subdistrict 2 (the suburbs).

The charter of the Sewer District provides for the appointment of seven trustees. Two seats on the Board of Trustees are to be appointed by the Mayor of Cleveland who is the appointing authority for Subdistrict 1; two are to be appointed by the Suburban Council of Governments which is the appointing authority for Subdistrict 2; one is to be appointed by the Cuyahoga County Commissioners, to be representative of municipalities from the Three Rivers Watershed District; one is appointed by the appointing authority of the subdistrict having the greatest sewage flow, which at all times since 1972 has been the City of Cleveland; and one trustee is to be appointed by the appointing authority of the subdistrict having the greatest population is of the most recent decennial census. It is this seventh seat on the Board of Trustees, the 'population seat," which is claimed by both the City of Cleveland and the Suburban Council of Governments.

***3** At oral hearings on the merits before this court the appellees argued that due to the failure of the administration of Mayor Ralph J. Perk in 1972 to appeal the original judgment entered by the trial court creating the Cleveland Regional Sewer District, [FN2] the appellant City forfeited the opportunity to directly challenge the method prescribed by the charter for selecting the trustees of the Sewer District. Regardless of the merits of this contention, the sole issue before this court on appeal is whether the trial court's interpretation of the charter of the Sewer District is correct.

FN2 By journal entry seven years later (May 25, 1979), the Court of Common Pleas changed the name to Northeast Ohio Regional Sewer District.

In view of the major population shifts from the central City of Cleveland to suburban communities throughout Cuyahoga County and adjacent counties which already occurred by 1972, and in view of the fact that the plans of the Sewer District contemplated dramatic expansion of the Cleveland Sewer lines to all these communities within and beyond County lines, it was inevitable that the "population trustee" would eventually be appointed by the appellee Suburban Council of Governments, and that the balance of power on the Board of Trustees of the Sewer District would eventually shift from the City of Cleveland to the Suburban Council of Governments.

This court must therefore determine whether this shift of power has yet occurred under the terms of the charter of the Sewer District, or whether the City of Cleveland still retains power to appoint the seventh and controlling vote on the Board of Trustees.

All parties agree that Subdistrict I consists of the City of Cleveland, and that, according to the 1980 decennial census, the population of Cleveland was 570,500. The parties disagree as to the territory and population of Subdistrict 2. This disagreement arises from contradictory definitions of the area of the Sewer District and its subdistricts contained in separate provisions of the charter of the Sewer District. As noted above, Section 6 of the charter contains a general description of the area of the Sewer District and its Subdistricts; Section 6 provides as follows:

"(a) The District will initially include all political subdivisions in Cuyahoga County, Ohio, presently served by Cleveland's wastewater treatment facilities and those presently planned to be served, i.e. the municipalities to be served by the Cuyahoga Valley Interceptor and the branch of the Heights Express Interceptor to serve Richmond Heights and Highland Heights. A more detailed description of such area is attached

hereto and made a part hereof and marked Exhibit 'A' (1).
"(b) The District will initially be composed of two subdistricts, one consisting of the City of Cleveland (Subdistrict No. 1), and the other consisting of the areas outside of the City of Cleveland in Cuyahoga County, Ohio, (Subdistrict No. 2). Other subdistricts may be created at the Board's discretion."

*4 Exhibit "A" (1) of the charter, which according to the above-quoted language, comprises "a more detailed description" of the area of the Sewer District, originally listed 39 municipalities, all or part of which were to be included in the territory of the Sewer District. The introductory paragraph of Exhibit "A" (1), and the first four municipalities listed, are as follows:

"The territory to be included in the Cleveland Regional Sewer District shall include all the territory located within the boundaries outlined on the attached map, which territory is that portion of Cuyahoga County presently served, or mainly capable of being served by gravity, by sewers leading to the three wastewater treatment plants of the City of Cleveland plus the territory in Cuyahoga County to be served initially by the proposed Cuyahoga Valley Interceptor Sewer.
The political subdivisions to be included in whole or in part in the Cleveland Regional Sewer Districts are the following:
Beachwood, City of (all)
Bratenahl, Village of (all)
Brecksville, City of (all)
Broadview Heights, City of (all except that portion located south of the Ohio Turnpike)."

Exhibit 'A' (1), describing the territory of the Sewer district, was included in the charter pursuant to Paragraph (E) of R.C. 6119.02, which provides that the petition establishing a regional sewer district shall set forth:

"a general description of the territory to be included in the district which need not be given by metes and bounds or by legal subdivisions, but it is sufficient if an accurate description is given of the territory to be organized as a district. . . ."

The definition of the sewer district contained in Section 6 of the charter is practically a tautology; the Sewer District is defined as the political subdivisions presently served by or presently planned to be served by the Sewer District. This language is not the "accurate description" of the territory of the regional sewer district called for in R.C. 6119.02(E). This "accurate description" is contained only in Exhibit "A" (1) of the charter.

The charter was modified by the trial court in 1979 to include four more complete municipalities in the Sewer District. One of these municipalities (Strongsville) lies in Cuyahoga County; three of them (Village of Northfield, Macedonia, and Sagamore Hills Township) lie in Summit County. The Court of Common Pleas modified Exhibit "A" (1) of the charter to include these four municipalities in the Sewer District, after both the Board of Trustees of the Sewer District and the legislative bodies of the respective municipalities haad adopted resolutions in favor of annexation. Because the trial court did not modify Section 6 of the charter or the introductory paragraph of Exhibit "A" (1), which indicate that the territory of the Northeast Ohio Regional Sewer District is limited to areas inside Cuyahoga County.

The trial court in the case at bar held that Subdistrict 2 consists of all of Cuyahoga County outside the City of Cleveland, plus the three Summit County municipalities formally incorporated into the Sewer District in 1979. The basis for the court's ruling was that the court at all times intended that the sewer district would eventually comprise this extensive area, and that the Sewer District had, from the outset, planned to construct a comprehensive sewer system for the whole county. Evidence was adduced that the Sewer District had expended millions of dollars for this purpose, in laying the groundwork for the eventual construction of five "interceptors" (large sewage pipelines), to service all of Cuyahoga County plus some adjacent communities. Of these pipelines, only one (Cuyahoga Valley Interceptor - Phase 1) was under construction at the time of trial. The other four interceptors (the Southwest Interceptor, Cuyahoga Valley Interceptor - Phase 2, Cuyahoga Valley

Interceptor - Phase 3, and the Heights-Hilltop Interceptor) were in various planning stages.

***5** The appellants, the City of Cleveland and its Mayor, have assigned two errors for review by this Court. The first assignment of error raises two jurisdictional points, while the second assignment of error attacks the merits of the trial court's decision. [FN3] We find it more convenient to consider the second assignment of error first.

> FN3 Assignment of Error No. 1:
> THE TRIAL COURT ERRED IN REFUSING TO DISMISS PARMA'S MOTION TO MODIFY JUDGMENT AND REQUEST FOR TEMPORARY RESTRAINING ORDER, AND PLAINTIFFS' COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION. A. THE TRIAL COURT LACKED JURISDICTION TO INVALIDATE THE MAYOR'S APPOINTMENT OF MARY J. COLEMAN TO THE OFFICE OF TRUSTEE OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT, BECAUSE SUCH A QUESTION IS DETERMINABLE EXCLUSIVELY IN A QUO WARRANTO PROCEEDING.
> B. THE TRIAL COURT WAS NOT AUTHORIZED TO ENTERTAIN PLAINTIFFS' REQUESTS FOR AMENDMENT OF THE CHARTER OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT, EITHER BY MOTION TO MODIFY JUDGMENT OR BY NEW ACTION, BECAUSE NEITHER PLAINTIFF IS AUTHORIZED BY R.C. CHAPTER 6119 TO PETITION FOR AMENDMENTS TO THAT CHARTER.
> Assignment of Error No. 2:
> THE TRIAL COURT'S DECISION IS CONTRARY TO LAW AND THE WEIGHT OF THE EVIDENCE.
> A. THE TRIAL COURT ERRED IN FINDING THAT THE TERRITORY OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT ENCOMPASSES ALL OF CUYAHOGA COUNTY, BECAUSE CITIES, VILLAGES, AND TOWNSHIPS MAY NOT BE INCLUDED IN SUCH A DISTRICT WITHOUT THEIR CONSENT.
> B. THE TRIAL COURT ERRED IN FINDING THAT THE TERRITORY OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT ENCOMPASSES ALL OF CUYAHOGA COUNTY, BECAUSE THAT QUESTION WAS NOT RAISED BY PLAINTIFFS' COMPLAINT; ALL PARTIES TO THIS ACTION ADMITTED AND STIPULATED TO A MUCH SMALLER TERRITORY; AND THE CHARTER OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT, AS MANDATED BY STATUTE, EXPRESSLY DESCRIBES A SMALLER TERRITORY.
> C. THE TRIAL COURT ERRED IN DECLARING THAT THE SUBURBAN COUNCIL OF GOVERNMENTS OF THE NORTHEAST OHIO REGIONAL SEWER DISTRICT IS THE APPOINTING AUTHORITY OF THE TRUSTEE OF THE SEWER DISTRICT FOR THE TERM COMMENCING MARCH 2, 1982.

I.

It is now settled under Ohio law that a municipality cannot be merged into a regional water or sewer district without its consent. Seven Hills v. Cleveland (1980), 22 Ohio Op. 3d 78 (Cuy. Cty. Ct. App.) (Day, J.). [FN4] It is also well settled that all aspects of the formation of a regional sewer district are governed by R.C. Chapter 6119. Kucinich v. Cleveland Regional Sewer District (1979), 64 Ohio App. 2d 6 (Cuy. Cty. Ct. App.) (Krenzler, J.). This court held, in the Kucinich case, that the sole means of amending the charter of the Sewer District is provided by R.C. Chapter 6119:

> FN4 At pp. 91-92 of the opinion, this court stated:

"R.C. Sec. 6119.06 delineates the rights, powers, and duties with which the district's board of trustees is vested. Subparagraph (M) grants the power to acquire land 'by purchase or otherwise, * * * or by the exercise of the right of condemnation * * *.' However, the board may not condemn (appropriate) 'any * * * water management facility owned by an * * * political subdivision, * * *.'

"This section has seemingly been enacted in deference to the right of municipalities to acquire and operate public utilities outside the region. This initial right is unequivocably granted by Article XVIII, Section 4, of the Ohio Constitution:

"'Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service * * *.'

The Supreme Court of Ohio has held that by virtue of this Constitutional provision, the legislature 'has no power to limit or restrict * * * the power and authority of a municipality to operate a public utility * * *,' State, ex rel. McCann v. City of Defiance, 167 Ohio St. 313, 316, 4 O. O. 2d 369, 371 (1958).

"Surely, if the legislature granted the district's board of trustees the power to condemn a municipality's water management facilities, this would be in derogation of the constitutional grant of power to municipalities to operate their waterworks system (public utilities). Thus, the power to condemn is specifically limited and emphasizes the legislative recognition of the limits of its authority to authorize cancellation of the municipal powers granted by Article XVIII, Section 4.

"Involuntary inclusion of a municipality in such a region would amount to no less of an incursion. For inclusion within the district, with the attendant grant of broad powers to the board of trustees, must necessarily divest a municipality of all or part of its control over the operation of any waterworks facilities which it may happen to own, lease, or operate. The same invasion of its power would limit its ability to freely contract for its water supply.

"The legislature will not be presumed to have acted in an unconstitutional manner. Put oven if this conclusion were not mandated by Article XVIII, Section 4, the statute must necessarily be construed as not contemplating involuntary inclusion. The failure to provide for the contingency of a non-consent ing municipality, viewed in light of the total statutory plan, requires the conclusion that the legislature did not sanction involuntary inclusion by means of the procedures set down in Chapter 6119.'

***6** "* * * we again emphasize that the Cleveland Regional Sewer District is an independent political subdivision created under R.C. Chapter 6119, and that everything related to it is governed by R.C. Chapter 6119. This includes its formation and operation. The cities, counties, townships and the courts are bound by the provisions of R.C. Chapter 6119, and both the formation of the district and its operation must be conducted within the confines of R.C. Chapter 6119.

"The trial court correctly noted that the petition approved by the court and filed under R.C. 6119.02 is the charter of the Regional Sewer District. However, like all charters and constitutions, the petition may be amended from time to time according to certain established procedures. The established procedure for amending either the petition or the plan is by filing a petition with the court requesting an amendment or modification of either the petition or the plan. This is the exclusive method for amending or modifying either the petition or the plan. Any other governmental agency, such as a city, county or township, cannot amend or modify any portion of the approved petition or approved plan by enactment of an ordinance or a resolution. A petition must be filed with the

court requesting an amendment or modification of either the petition or the plan for the operation of the district."
(Emphasis added).
64 Ohio App. 2d, at 15-16.

From the foregoing, it is axiomatic that the Northeast Ohio Regional Sewer District consists of only those municipalities which have already been incorporated into the District by their voluntary action pursuant to R.C. 6119. This is limited to the 43 municipalities and portions of municipalities presently listed in Exhibit "A" (1) of the charter. It was stipulated at trial that the population of the 42 suburban municipalities and partial municipalities listed in the Exhibit was 563,511, and that the population of the City of Cleveland according to the 1980 census was 570,500. (Plaintiff's Exhibit 6). Thus, the Mayor of the City of Cleveland, as the appointing authority of Subdistrict 1 of the Sewer District, is entitled to appoint the "population trustee" to the Board of the Sewer District.

The trial court found that Subdistrict 2 of the Sewer District includes all of Cuyahoga County except Cleveland, and the appellees City of Parma and Suburban Council of Governments contend that Subdistrict 2 includes municipalities which will eventually be served by the interceptors being planned by the Sewer District. This court is persuaded that these contentions are incorrect, for the reason that the statutorily required "accurate description" of the territory of the Sewer District is exclusively contained in Exhibit "A" (1) of the charter, and this Exhibit includes all those municipalities which have voluntarily joined the Sewer District pursuant to R.C. Chapter 6119.

The trial court expressed concern that a restrictive pending of the charter would inhibit the Sawer District from changing its plan to expand its operation, or from building interceptors to carry the anticipated flow of sewage other municipalities. The trial court purported to enter judgment including all of Cuythoga County within the Regional Sewer District, without the consent of non-member municipalities, and without even making such municipalities parties to the action. [FN5] Appellant called as witnesses the city engineers from several Cuyahoga County municipalities which operate their own sewage treatment plants; these witnesses stated that their municipalities had no plans to join the Regional Sewer District within the next five years. One such municipality, the City of Euclid, filed an amicus curiae brief in which it was contended that the Sewer District lacks authority over wastewater systems of municipalities which have not been incorporated into the District pursuant to R.C. Chapter 6119.

FN5 The trial court stated, in its judgment entry:
"The Court finds, adjudges, decrees and declares that. . . (2) the area of NORSD consists of the entire area of Cuyahoga County and the said area of Northfield, Macedonia, and the Township of Saginaw Hills in Summit County; (3) NORSD has the authority to exercise within the entire area of Cuyahoga County, Ohio and those areas of Summit County, Ohio stared in #2 hereof, all of the rights and powers granted by ORC Chapter 6119, including the right of eminent domain, as specified in said ?? provided for in ?? NORSD. . . .

***7** The question of the scope of the authority of the Northeast Ohio Regional Sewer District is collateral to the subject matter of this lawsuit. It is not before this court, and nothing in this opinion may be taken as indicating that the Sewer District either possesses or lacks authority to proceed with planning and constructing the interceptors referred to in the record. The sole issue decided by the opinion of this court is to determine the territory which constitutes Subdistrict 2 of the Sewer District, for purposes of representation on the Board of Trustees. The second assignment of error is well taken.

II.

Appellants contend that the Court of Common Pleas lacks authority to interpret the provisions of the charter of the Sewer District relating to the composition of Subdistrict 2 on the ground that this

affects the right of a person to public office, and that therefore the appellees should have instituted an action in quo warranto in the Court of Appeals or the Supreme Court. Appellants also contend that the City of Parma (which is one of the charter municipalities of the Sewer District) and the Suburban Council of Governments (which is the appointing authority of Subdistrict 2) lack standing to maintain this suit.

Essentially, this lawsuit requests an interpretation of the charter of the Sewer District, which was approved by the Court of Common Pleas pursuant to R.C. 6119. As noted above, it has been held that all matters pertaining to formation and operation of the Sewer District are governed by R.C. Chapter 6119. Kucinich v. Sewer District (1979), 64 Ohio App. 2d 6.

Suits in quo warranto must be filed in the Court of Appeals of the Supreme Court. Art. IV, Secs. 2 and 3, Ohio Const. The gravamen of a quo warranto proceeding is to test the right of a specific individual to public office. The right of any individual to the office of Trustee of the Regional Sewer District is merely incidental in the case at bar. This lawsuit is, instead, concerned with the correct interpretation of the June 15, 1972 judgment of the Court of Common Pleas, a subject properly committed in the first instance to the Court of Common Pleas.

Jurisdiction over proceedings brought under Chapter 6119 is vested exclusively in the Common Pleas Court. The Court of Common Pleas has exclusive jurisdiction to determine and approve a petition for creation of a Regional Sewer District. Where a party seeks a judicial interpretation of such a petition, this court is firmly convinced that the party should seel the interpretation in the Court of Common Pleas.

In the case at bar, the Court of Common Pleas claimed jurisdiction to adjudicate this matter under Chapter 6119. [FN6] We are persuaded that this claim of jurisdiction was correct.

FN6 The trial court stated on its memorandum of opinion, that: "Parma ?? any other resident of the district has ?? to bury the ?? actions. Under the provisions in Chapter 6119, in the notice requirements to be given by it which were complied with, any person, corporation, or municipality has the required standing to request the relief prayed for in the complaint."

***8** It is also the holding of this Court of Appeals that the appellees City of Parma and Suburban Council of Governments have standing to seek an interpretation of the Sewer District charter by the Court of Common Pleas. Though only the District may seek a modification of the charter, pursuant to R.C. 6119.051, it is our holding that both of the plaintiff appellees had a direct interest in the issue at bar, which was affected by the outcome of the case. In view of their interest in the outcome, both parties had standing to seek a declaratory judgment concerning the interpretation of the charter of the Sewer District. Cf. Boulger v. Evans (1978), 54 Ohio St. 2d 371; Lugo v. Miller (C.A. 6, 1981), 640 F. 2d 823. The first assigned error is not well taken.

Accordingly, the decision of the Court of Common Pleas is reversed, and judgment entered in favor of appellant City of Cleveland.

MARKUS, J., CONCURRING IN PART AND DISSENTING IN PART:

I agree that the trial court improperly interpreted and extended the Sewer District's Charter, in rejecting Cleveland's mayor as the appointing authority for the District's "population trustee", and I concur in the majority's ruling that the mayor is authorized to make that appointment. However, I respectfully disagree with the majority's acceptance of the trial court's jurisdiction to hear and decide these issues.

I believe this suit for declaratory and injunctive relief seeks a remedy cognizable only in a quo warranto action. The Ohio Constitution and statutes mandate that such an action must be

commenced in the supreme court or a court of appeals. Accordingly, I dissent from the majority's disposition of the first assignment of error and its corresponding syllabi. I would dismiss this action for lack of jurisdiction by the court in which it was filed.

The Constitution vests the Ohio Courts of Appeals with "original jurisdiction" for "[q]uo warranto" actions. Ohio Const., Art. IV, Sec. 3. It gives the supreme court concurrent "original jurisdiction" for "[q]uo warranto" actions, as well as "appellate jurisdiction . . . in appeals from the courts of appeals as a matter of right in [quo warranto] [c]ases originating in the courts of appeals". Ohio Const., Art. IV. See. 2.

Common pleas courts have jurisdiction only when provided by law (Ohio Const., Art. IV, Sec. 4). By statute "an action in quo warranto can be brought only in the supreme court, or in the court of appeals of the county in which the defendant, or one of the defendants, resides or is found . . . ." R.C. 2733.03. Common pleas courts have no jurisdiction to consider quo warranto actions. See State, ex rel. Maxwell v. Schneider (1921), 103 Ohio St. 492, 496. Presumably the drafters of the constitutional language and the legislature excluded common pleas courts from these extraordinary actions deliberately and for good reasons.

Chapter 2733 of the Revised Code defines the scope and form of quo warranto actions. More specifically, the following sections govern disputes about the right of any person to hold a public office:

***9** "§ 2733.01 Proceedings against a person.

"A civil action in quo warranto may be brought in the name of the state:

"(A) Against a person who usurps, intrudes into, or unlawfully holds or exercises a public office, civil or military, or a franchise, within this state, or an of fice in a corporation created by the authority of this state:"

"§ 2733.03 Jurisdiction and venue in quo warranto actions.

"An action in quo warranto can be brought only in the supreme court, or in the court of appeals of the county in which the defendant, or one of the defendants, resides or is found, or, when the defendant is a corporation, in the county in which it is situated or has a place of business. When the attorney general files the petition, such action may be brought in the court of appeals of Franklin county."

"§ 2733.04 Commencing quo warranto.

"When directed by the governor, supreme court, secretary of state, or general assembly, the attorney general, or a prosecuting attorney, shall commence an action in quo warranto. . . ."

"§ 2733.05 Bringing action.

"The attorney general or a prosecuting attorney may bring an action in quo warranto upon his own relation, or, on leave of the court, or of a judge thereof in vacation, he may bring the action upon the relation of another person. If the action is brought under division (A) of section 2733.01 of the Revised Code, he may require security for costs to be given as in other cases."

"§ 2733.06 Usurpation of office.

"A person claiming to be entitled to a public office unlawfully held and exercised by another may bring an action therefor by himself or an attorney at law, upon giving security for costs."

"§ 2733.07 Prosecution in absence of prosecuting attorney.

"When the office of prosecuting attorney is vacant, or the prosecuting attorney is absent, interested in the action in quo warranto, or disabled, the court or a judge thereof in vacation, may direct or permit any member of the bar to act in his place to bring and prosecute the action."

"§ 2733.08 Petition against person for usurpation of office.

"When an action in quo warranto is brought against a person for usurping an office, the petition shall set forth the name of the person claiming to be entitled to the office, with an averment of his right there to. Judgement may be rendered upon the right of the defendant, and also on the right of the person averred to be so entitled or only upon the right of the defendant as justice requires.

"All persons who claim to be entitled to the same office or franchise may be made defendants in one action to try their respective rights to such office or franchise."

"§ 2733.09 Leave to file petition notice.
"Upon application for leave to file a petition in an action in quo warranto, the court or judge may direct notice thereof to be given to the defendant previous to granting such leave, and may hear the defendant in opposition thereto. If leave is granted, an entry thereof shall be made on the journal, or the fact shall be indorsed by the judge on the petition, which shall then be filed."
***10** "§ 2733.10 Issue of summons and service.
"When the petition in an action in quo warranto is filed without leave and notice, a summons shall issue, and be served as in other cases. Such summons may be sent to and returned by the sheriff of any county by mail. The sheriff is entitled to the same fees thereon as if it had been issued and returned in his own county."
"§ 2733.11 Service by publication.
"When a summons in an action in quo warranto is returned not served because the defendant, or its officers or office, cannot be found within the county, the clerk of the court in which the action was brought must publish a notice for four consecutive weeks in a newspaper published and of general circulation in the county, setting forth the filing and substance of the petition. Upon proof of such publication the default of the defendant may be entered and judgment rendered thereon, as if he had been served with summons."
"§ 2733.12 Pleadings after petition.
"The defendant in an action in quo warranto may demur or file an answer, which may contain as many several defenses as he has, within thirty days after the filing of the petition, if it was filed on leave and notice, or after the return day of the summons. The plaintiff may file a demurrer or a reply to such answer within thirty days thereafter."
"§ 2733.13 Court may extend time for pleading.
"In an action in quo warranto an order may be made by the court, or by a judge thereof, extending the time within which a pleading may be filed. Such order does not work a continuance of the case."
"§ 2733.14 Judgment when office, franchise, or privilege is usurped.
"When a defendant in an action in quo warranto is found guilty of of usurping, intruding into, or unlawfully holding or exercising an office, franchise, or privilege, judgment shall be rendered that he be ?? and excluded there from, and that the relator cover his costs."
"§ 2733.17 Rights of person adjudged entitled to an office.
"If judgment in an action in quo warranto is rendered in favor of the person averred to be entitled to an office, after taking the oath of office and executing any official bond required by law, he may take upon him the execution of the office. Immediately thereafter such person shall demand of the defendant all books and papers in his custody or within his power appertaining to the office from which the defendant has been ousted."

It is difficult to believe that the legislature adopted this relatively comprehensive procedure in the expectation that it could be completely circumvented by labelling the suit with another name. Thus, it is not surprising that Ohio courts have repeatedly insisted that quo warranto is the sole proceeding to challenge another's title to public office. E.g., Harding v. Eichlinger (1898), 57 Ohio St. 371; Hogan v. Hunt (1911), 84 Ohio St. 143; Steiss v. State (1921). 103 Ohio St. 33; State, ex rel. Maxwell v. Schneider, supra; State, ex rel. Kirk v. Wheatley (1938). 133 Ohio St. 164; State v. Staten (1971), 25 Ohio St. 2d 107; State. ex rel. Kay v. Nixon (1948), 82 Ohio App. 264; (1958), 103 Ohio App. 521; 110 Ohio App. 125.

***11** Thus, the courts of appeals and the supreme court have considered the precise issue involved here by quo warranto proceedings, viz whether one governmental official had legal authority to appoint another governmental official. E.g., State, ex rel. Sheets v. Speidel (1900), 62 Ohio St. 156 (appointment of sheriff when deceased person was elected); State, ex rel. Hoyt v. Metcalfe (1909), 80 Ohio St. 244 (appointment of judge by governor when elected person dies before taking office); State, ex rel. Morris v. Sullivan (1909), 81 Ohio St. 79 (appointment of judge by governor for term commencing after end of governor's term); State, ex rel. Devine v. Hoermle (1959), 168 Ohio St. 461 (appointment of councilman by mayor when council fails to exercise its power of selection); Jones v.

Sater, supra (same).

An alleged incumbent in office may bring an injunction action against another who claims title to that office and thereby interferes with the alleged incumbent's service. Reemelin v. Mosby (1890), 47 Ohio St. 570; Harding v. Eichlinger, supra at 374. A preliminary injunction may be allowed as ancillary relief to maintain the status quo while a quo warranto action is being resolved. Reemelin v. Mosby, supra, at 572. An injunction can be used to restrain allegedly unauthorized activities by an incumbent which surprisedly harm the plaintiff so long as the action does not harm the incumbent's right and title to that office. Green v Commissioner (1914), 90 Ohio St. 252. However, an injunction cannot be used to test title to a public office, even when the supposed appointee has not yet begun to hold the office or perform its duties. Jones v. Sater, supra. Cf. State, ex rel. Kirk v. Wheatley, supra at 166 ('intruding into' public office which is challengeable solely by quo warranto 'means the entering into without right or title of entering').

The trial court asserted jurisdiction over this case on two theories: (1) this is a declaratory relief action to interpret a sewer district charter created with statutory approval by the same trial court, and (2) the action enjoins the appointing authority before the appointment is accomplished, without seeking to exercise jurisdiction over the alleged appointee. In my view, these contentions are simply a pretext offered by plaintiffs to avoid the mandatory form and forum for this action. Virtually every challenge to another's title to a public office can be phrased as an action for declaratory relief seeking interpretation of some underlying constitutional or legislative provision. If that ploy were allowed, there would never be need to utilize the specialized remedy of quo warranto, which can only be brought in select appellate courts.

Nor is there any particular significance that the office involves a sewer district created under the auspices of that trial court. The code authorizes an appropriate common pleas court to approve the application by governmental units for the formation of a sewer district (R.C. 6119.02 - 6119.04), and to approve later applications by other governmental units to include part or all of their territories in that district. R.C. 6119.05. Nothing in the code suggests that the same common pleas court or any other court has special authority to interpret the district's charter. Indeed, R.C. 6119.08 expressly provides that the district can enforce its lawful authority by a "suit in mandamus in the court of appeals in the first instance, if it deems it advisable". The lack of any special authority for the common pleas court to interpret the charter of a regional sewer district created under its auspices is exemplified by the unanimous ruling of this court rejecting that court's interpretation of the charter in the present case.

***12** Finally, there is no merit to plaintiffs' contention that declaratory relief or injunctive relief is available because the mayor may not have physically accomplished his intended appointment, and he is the focus of the action rather than the appointee. Once again, the mandatory form and forum for actions to challenge title could be circumvented by this argument in virtually every case, if the challenger could reach the courthouse before the anticipated appointment is completed. That contention was rejected by the Franklin County Appeals Court who issued a writ of prohibition to prevent the same procedure in like circumstances. Jones v. Sater, supra.

The purported virtue of this approach is perhaps its greatest vice. By attacking the appointing authority rather than the appointee, plaintiffs succeeded in divesting the appointee from title to an office without joining the appointee as a party to the case or giving the appointee an opportunity to participate in the trial or any appellate review. A quo warranto action must name the purported office holder as a party. R.C. 2733.01, 2733.08 - 2733.12. The relief afforded in quo warranto is an exclusion of the defendant from that office. R.C. 2733.14.

I would dismiss the action for lack of jurisdiction by the common pleas court to resolve a quo warranto action which has been improperly cast in another form.

Not Reported in N.E.2d, 1983 WL 5775 (Ohio App. 8 Dist.)

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