

Evangelish Lutherish St. M. Gemeinde v. Pruess, 140 Wis. 349.

it is true, but apparently relative to the meeting of May 5th. He gave the following testimony:

"There was no meeting before May 5th. . . . I went out mad, and Koehler came after me, and I told him after this I would not pay them a ——— cent. Thereupon they called that meeting of May 5th for that purpose to accept it. David Meisner made a motion that they should accept it. They simply refused to vote on it, no action made whatever. Thereupon I made a motion to ask them to release me from the church; that they would not vote on. Then I asked them to withdraw that subscription, give me a chance to sign like them so I could stand to pay afterward. They simply voted that down. They did not want it. Thereupon I left and ceased to be a member. . . . I told them I would not have anything more to do with that church and would not pay a cent any more."

After this he was waited upon by the pastor and another member of the congregation. They said to him the congregation had done wrong in that they would not accept it, and that they were going to accept it after that provided he came back to the church, and he told them he did not want to come back.

In the face of this positive testimony on the part of the appellant and the uncertain testimony on the part of the respondent as to the time of acceptance of the subscription, it is difficult to see on what grounds the circuit court directed a verdict for the respondent. The subscription was a mere offer until accepted by the respondent. *M. E. Church v. Sherman*, 36 Wis. 404; *U. S. Grant University v. Bentley*, 117 Wis. 260, 94 N. W. 42; 27 Am. & Eng. Ency. of Law (2d ed.) 280, 285.

In the case at bar this legal quality of a subscription was accentuated by the designation to the person soliciting the subscription by the appellant of the body which should accept his subscription and the concessions that body should make by such acceptance. It is true that acceptance of a subscription may be made by expending money and erecting a

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building in accordance with the offer. *Superior C. L. Co. v. Bickford*, 93 Wis. 220, 67 N. W. 45; *Eycleshimer v. Van Antwerp*, 13 Wis. 546. But in the instant case another kind of acceptance was expressly stipulated for, and, besides, there is no proof that the congregation accepted this prior to its attempted withdrawal by erecting a building or disbursing money relying on such subscription.

We forbear to comment further on the evidence. Another trial may disclose a different state of facts or result in clearer and more definite statements from the same witnesses, or show that the attempted revocation by the appellant was after the subscription was accepted by the congregation of the respondent, upon the conditions stipulated. We regard the complaint as sufficient, but are constrained to reverse the judgment appealed from because the court below erred in directing a verdict for the respondent. As to the appellant so contracting, if a contract was really closed, notwithstanding informalities in the articles of incorporation the respondent was at least a corporation *de facto*.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

FENTON and others, Appellants, vs. RYAN and others, Respondents.

September 18—October 5, 1909.

Villages: Boundaries and area: Legislative discretion: Questions for courts: Constitutional restrictions: Water areas.

1. The legislature, having the power to create villages, necessarily has a large discretion in the matter of determining what their boundaries shall be; and the courts will interfere with legislative action in that matter only when the discretion has been abused and there has been a violation of sec. 3, art. XI, Const.

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- (requiring the legislature to provide for the organization of incorporated villages), or of sec. 23, art. IV (requiring uniformity in town and county government).
2. Restrictions upon the size and with respect to density of population of territory which may be included in an incorporated village must be implied from the name of the corporation and the purpose for which it is incorporated.
 3. It may well be that it is competent for the legislature to say, as in sec. 854, Stats. (1898), that the area of a village to be incorporated shall not be less than one half a square mile, on the ground that territory to that extent is reasonably necessary to carry out the purposes for which villages are incorporated.
 4. The inclusion in a new village of territory, in excess of one half a square mile, consisting of sparsely settled rural or agricultural lands not having the distinctive characteristics of a village or any natural connection therewith, and not reasonably appurtenant and necessary for the future growth of the village, would be an invasion of the uniformity in town and county government required by sec. 23, art. IV, Const.
 5. Whether, in a given case, the territory in excess of one half a square mile which it is proposed to include in a new village is such that it may properly be included therein, is a question for the courts. A *dictum* to the contrary in *In re North Milwaukee*, 93 Wis. 616, *held obiter*.
 6. A holding by the circuit court in this case that a water area of seventy-five acres embraced within the boundaries of a proposed village should be included as part of the one-half square mile provided for by sec. 854, Stats. (1898), was not erroneous; nor was it tantamount to a holding that no village could be incorporated which bordered on a large body of water, since the petitioners need not include water areas in their proposed boundaries, nor is there any statutory limitation of the area of the village other than that it shall not include the entire town or towns.

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed*.

The appeal is from an order denying the application of the petitioners for an order incorporating the village of Kimberly.

For the appellants there were briefs by *C. G. Cannon*, attorney, and a separate brief by *Hooper & Hooper*, of counsel, and oral argument by *Mr. Cannon* and *Mr. Moses Hooper*.

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For the respondents the cause was submitted on the brief of *Albert H. Krugmeier*.

BARNES, J. The court found that of the 576 acres embraced within the boundaries of the proposed village about 465 acres were rural or agricultural lands sparsely settled, not having the distinctive characteristics of a village, and not reasonably appurtenant to the remaining territory, and not necessary to be included within the limits of the proposed village for any legitimate purpose. Of the remaining 113 acres the court found that seventy-five acres were covered with water, and that the settled portion of the proposed village contained but thirty-eight and one-half acres, and that one half a section of land, including the submerged acreage, was ample territory for the proposed village, in view of its location, surroundings, and prospect of future growth. Upon the findings so made the court denied the application of the petitioners.

But one substantial objection is urged in support of the claim that the order appealed from is erroneous. It is argued that it is no proper function of a court to decide whether the proposed boundaries include an excessive amount of land, so long as the proposed area does not conflict with any statutory requirement. It is urged that the matter of fixing the limits of the village is a legislative or political question and not a judicial one, so long as such limits include one half a square mile in area and do not include the entire town. The cases of *In re North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, and *Nash v. Fries*, 129 Wis. 120, 108 N. W. 210, are cited as sustaining the contention so made. It is held in the *North Milwaukee Case* that courts cannot decide questions of legislative policy by determining whether or not a village should be incorporated; that the legislature may say what prerequisites must exist and what steps must be taken before incorporation can be effected, and may authorize the courts to determine

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whether such facts exist, but that no discretion can be vested in the courts to grant or refuse a certificate of incorporation. It was said by way of illustration that a court might determine such questions as whether the survey was correct, whether the population was as large as the statute required in proportion to the area, and whether the statutory requirements have been complied with on all questions of fact which the court may determine, but that the court might not determine whether the lands embraced in the petition should justly be included in the village, or whether the interests of the inhabitants would be promoted by the incorporation, or whether the boundaries of the village could be enlarged or diminished as justice might seem to require; such questions being legislative or political and not judicial. In *Nash v. Fries, supra*, it was held that if ch. 21, Laws of 1905, should be construed as vesting any discretion in the court to say whether a new town should be organized or not, the law could not be upheld under the rule of the *North Milwaukee Case*.

If, as contended by counsel for appellant, the court, in deciding that the boundaries of the proposed village included territory which should have been excluded, was passing upon a question that was legislative and not judicial, it follows as a matter of course that the order appealed from is erroneous under the decisions referred to. That the question is one for judicial determination is decided in *State ex rel. Holland v. Lammers*, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. In deciding that case the court construed the law providing for the incorporation of villages in connection with sec. 3, art. XI, of our constitution, which declares that "It shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages," and also in connection with sec. 23, art. IV, of the constitution, which provides that "The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." The court there

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defined what a village was understood to mean at the time of the adoption of the constitution, and held: (1) That if the law authorizing the incorporation of villages, as properly construed, permits rural territory possessing none of the attributes of villages to change from town to village government at will, it cannot be sustained. (2) That the law providing for the incorporation of villages fixes no limitation as to the maximum size of the territory that may be incorporated, except that it must be part of a town or towns, and prescribes no restriction as to density of population, except that it shall contain a resident population of not less than a stated number. (3) That a village means an assembly of houses less than a city, but nevertheless urban or semi-urban in its character, and having a density of population greater than can usually be found in rural districts, and that this was the understood meaning of what constituted a village at the time the constitution was adopted. (4) That if the law providing for the incorporation of villages contains no restriction upon the size or density of population of the territory sought to be incorporated, a restriction must be implied from the name of the corporation and the purpose for which it is incorporated. (5) That only territory urban in character, with such adjacent lands as are naturally connected with and are reasonably appurtenant and necessary for future growth in view of the surroundings and circumstances of the location and prospects of future prosperity, may be incorporated in the village. (6) That the territory seeking admission as a village must be harmonious with the idea of what a village actually is. It may not include large areas of rural or agricultural lands sparsely settled or widely distributed. It may only include lands having the distinct characteristics of a village, and such additions as have a natural connection with and seem reasonably appurtenant to and necessary for future growth. (7) That it is a question of fact, to be determined in each case as the question arises, whether the provisions of the constitu-

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tion referred to may be violated by including territory within the limits of the village which should not be included therein. Such inquiry is judicial, not legislative, at least in the absence of any legislative declaration on the subject. (8) That the right to incorporate a village under sec. 854 is limited to such territory as possesses the characteristics mentioned. It must be a village in fact, with a reasonably compact center or nucleus of population, and not a mere agricultural community. If territory beyond the thickly settled limits is included, such territory ought reasonably to possess some natural connection with and adaptability to village purposes and seem reasonably to be necessary for future growth and development. (9) That in the absence of some specific legislation the courts must meet and determine in each given case the fact as to whether these restrictions have been overstepped.

It will be observed that the only declaration the legislature has made which affects the case before us for consideration is that any part of any town or towns not less than one half a square mile in area and not included in any village and all lying in the same county, which shall contain a resident population of 300 persons therein, may become incorporated as a village by taking certain steps enumerated in the statute. The legislature, having the power to create villages, necessarily has a large discretion in the matter of determining what the boundaries of such villages shall be. It is only when the discretion has been abused and the provisions of the constitution referred to have been violated that the courts may interfere with legislative action. The legislature has acted to the extent of saying that the area of the village which it is proposed to create shall not be less than one half a square mile. Beyond this the legislature has not gone. It may well be that it is entirely competent for the legislature to say that territory to the extent named is reasonably necessary to carry out the objects and purposes for which villages are incor-

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porated. When we get beyond the legislative declaration, however, it would seem to be clearly a question of fact for the court to determine in each instance, under the law as it stands, whether the territory in excess of one half a square mile which it is proposed to include possesses the attributes which should naturally belong to territory included within the confines of an incorporated village. If it is proposed to include rural or agricultural lands that are sparsely settled, and that have not the distinctive characteristics of a village, and have no natural connection therewith, and which do not seem to be reasonably appurtenant and necessary for the future growth of the village, then the uniformity of town and county government guaranteed by the constitution is invaded under the decision of this court in *State ex rel. Holland v. Lammers*, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501. There cannot be any doubt that such a question is judicial in its character. The courts are the ultimate tribunals to determine whether or not the constitution has been violated in a given case. It is not seriously contended in this case that the facts as found by the court are not supported by the testimony. This being true, we see no escape from the conclusion that it would be a violation of the provisions of the constitution referred to, to incorporate this village and include within its boundaries the amount of territory described in the petition for incorporation. The statement in the *North Milwaukee Case* that a court could not determine whether lands embraced in a petition for incorporation should justly be included in the proposed village was made in reference to a subject not directly before the court for determination and can hardly be considered a part of the decision of the court. Besides, the constitutional question raised and decided in *State ex rel. Holland v. Lammers* was not raised, passed upon, or considered in the *North Milwaukee Case*.

It is argued that the court was in error in holding that the water area embraced within the boundaries of the proposed

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village should be included as part of the one-half square mile provided for by sec. 854, Stats. (1898), and that such a ruling was tantamount to holding that no village could be incorporated which bordered on a large body of water. We do not think the position is tenable. The incorporators of the proposed village were not obliged to include water areas within the village limits if they did not desire to do so. Furthermore, there is no limitation placed upon the area of a village by statute further than to prevent the entire town or towns out of which the village is carved from being included within its boundaries.

We think the objectors had a sufficient interest in the proceeding to entitle them to appear therein and resist the granting of the petition, and that the court was authorized by sec. 860 to refer the questions in issue to a referee for examination and a report thereon, and that the order of the circuit court should be affirmed.

By the Court.—Order affirmed.

STATE EX REL. DAVERN, Respondent, vs. ROSE, Mayor, etc.,
Appellant.

September 20—October 5, 1909.

Constitutional law: Executive officers: Discretion: Interference by courts: Municipal corporations: Powers of mayor: Suspension of officers: Presumption of good faith: Mandamus.

1. Courts have no right to interfere with the exercise of the discretion vested in executive officers, state or municipal.
2. No wrong, in the legal sense, results when one receives all that the law accords him; and when the only right of an individual or of the public which the law gives is that which a designated officer deems best, the honest decision of that officer is the measure of the right.

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3. Where an absolute duty, involving nothing of judgment or discretion, has been imposed upon an administrative or executive officer, performance thereof may be enforced in a proper case by the courts, if no other adequate method is provided.
4. A city charter declaring that the mayor shall be "the chief executive officer and the head of the fire department and of the police in said city" and that he shall "take care that the laws of the state and the ordinances of the city are duly observed and enforced," confers upon the mayor all of the power of a chief executive, except as elsewhere limited, with the necessary right of discretion and judgment, and does not make him a mere administrative officer.
5. The executive power conferred upon the mayor by such a charter includes the power to appoint and remove subordinate executive officers at discretion, except as qualified by other charter provisions.
6. Where a statute (ch. 378, Laws of 1885) amending a city charter vested the power of appointment and removal of the chiefs of the fire and police departments in a board of commissioners, but provided that either of said officers should be subject to suspension from office for cause by the mayor at any time, and that the mayor should at once communicate to said board the charge or charges against an officer so suspended, for the decision of the board thereon, the suspension might be made for any cause which, in the honest judgment of the mayor, might reasonably render it advisable for the public good.
7. The power and the duty of the mayor as to suspension of officers under such a statute is discretionary in a very high degree. He may weigh all considerations in determining whether he should exercise the power; and his decision not to exercise it, even where there has been gross dereliction on the part of the subordinate officer, is not subject to review or direction by the courts, unless there has been an entire refusal to consider and exercise discretion.
8. The mayor in such a case need not declare the reasons for his decision or his action in deciding against suspension, it being enough for him to declare that he deems the public welfare promoted by action or inaction, and even that declaration need only be by the act.
9. The courts in such a case must indulge in every *prima facie* presumption in favor of the good faith of the executive officer in his discharge of his duties, and only when it is established by the clearest possible evidence that he has wholly refused to exert his jurisdiction or to exercise any discretion whatever can the courts properly interfere by *mandamus*.