Recent Decisions

ANTI-TRUST LAW — RESTRAINT OF TRADE — ESTABLISHING MAXIMUM PRICES

Defendants, manufacturers of distilled spirits, cancelled plaintiff's distributorship franchise because of his failure to adhere to maximum resale prices set by the defendants. Plaintiff sued and recovered treble damages for violation of the Sherman Anti-Trust Act. The case was reversed on appeal. 182 F. 2d 228 (7th Cir. 1950). On certiorari, *held,* reversed. An agreement among competitors to fix maximum resale prices restrains ability of traders to sell in accordance with their own judgment and therefore is in violation of the Sherman Anti-Trust Act. *Kiefer-Stewart Co. v. Joseph E. Seagram Inc.,* et al., 340 U.S. 211 (1951).

The Sherman Anti-Trust Act is declaratory of the previous common law on agreements in restraint of trade. *United States v. American Tobacco Co.,* 221 U.S. 106 (1911); *American Column and Lumber Co. v. United States,* 257 U.S. 377 (1921); *United States v. American Linseed Oil Co.,* 262 U.S. 371 (1923); *Cline v. Frink Co.,* 274 U.S. 445 (1927); 21 Cong. Rec. 2457-60 (1890). A contract in restraint of trade was one which imposed a restriction upon the business of both parties by limiting competition between them in the supposed interest of both. *Mitchell v. Reynolds,* 1 P. Wms. 181 (Ch. 1711); *Cincinnati Packet Co. v Bay,* 200 U.S. 179 (1906). The general common law rule was that contracts in restraint of trade were in themselves bad in the eyes of the law unless from the peculiar circumstances of each particular case they appeared to be reasonable. *Beal v. Chase,* 31 Mich. 490 (1875); *Lange v. Werk,* 2 Ohio St. 519 (1853); *Morris Run Coal Co. v. Barclay Coal Co.,* 68 Pa. 173, 8 Am. St. Rep. 159 (1872); PATTERSON, RESTRAINT OF TRADE 5 (1891). Agreements fixing prices were construed as restraints of trade at common law. *United States v. Addyston Pipe and Still Co.,* 175 U.S. 211 (1899); Pope, *The Legal Aspect of Monopoly,* 20 HARV. L. REV. 181 (1906). In reviewing the decisions of the past sixty years considerable conflict is observed on the issue of whether price-fixing agreements are illegal per se or whether reasonableness is a valid defense. Peppin, *Price Fixing Under the Sherman Anti-Trust Act,* 28 CALIF. L. REV. 667 (1940). The argument for the test of reasonableness is that since every agreement regulating trade restrains trade, the true test of legality is whether the restriction imposed regulates or suppresses competition. *Standard Sanitary Manufacturing Co. v. United States,* 226 U.S. 20 (1912); *Thomsen v. Cayser,* 243 U.S. 66 (1917); *Board of Trade v. United States,* 246 U.S. 231 (1918). The doctrine that

price-fixing is illegal per se rests upon the argument that the power to fix prices gives the power to control the market and to fix arbitrary and unreasonable prices. *United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290 (1897); *Dr. Miles Medical Co. v. John D. Park & Sons,* 220 U.S. 373 (1911); *United States v. Trenton Potteries Co.,* 273 U.S. 392 (1927); THORNTON, COMBINATIONS IN RESTRAINT OF TRADE 277 (1928). This doctrine that price fixing is illegal per se is followed by the federal courts today. *United States v. National Association of Real Estate Boards,* 339 U.S. 489 (1950); see Notes, 8 C.J.S. 1042; 50 A.L.R. 1000 (1927). The concept of price-fixing has been extended to include any tampering with the price structure. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); HANDLER, CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTI-TRUST LAWS 14 (TNEC Monograph 38, 1941). An intent to increase prices is not an essential element of price fixing. *Fashion Originators Guild of America Inc. v. F.T.C.,* 312 U.S. 457 (1941).

In the principal case the Court considered for the first time the legality of maximum price ceilings. The court of appeals determined that these price levels still preserved the area of competition and as such were valid. The Supreme Court, in unanimously reversing the court of appeals, included the setting of maximum prices within the concept of price fixing. The objective of our anti-trust legislation in prohibiting all unreasonable restraints upon commerce is to protect the consumer against high prices caused by the removal of competition. *Eastern States Lumber Ass'n v. United States,* 234 U.S. 600 (1914); *Wilder v. Corn Products Refining Co.,* 236 U.S. 165 (1915); *Paramount Famous Lasky Corp. v. United States,* 282 U.S. 30 (1930); *Manderville Island Farms v. American Crystal Sugar Co.,* 334 U.S. 219 (1948); STOCKING AND WATKINS, MONOPOLY AND FREE ENTERPRISE 258 (1951). At first blush the setting of maximum price ceilings appears to be the exact antithesis of impairment of competition, because fixing a maximum price permits competition below the established level, while fixing resale prices entirely eliminates price competition. The validity of this subtle distinction is vitiated in the instant case by the defendants' subsequent action, as found by the district court, of entering into fair trade contracts with all wholesale distributors by which the above maximum price also became the minimum price. By refusing to distinguish between an agreement to prevent an increase in the resale price and an agreement to fix the resale price, the Court has prevented the use of this device to evade the Sherman Act.

Donald H. Tishman

APPEALS — ORDER GRANTING NEW TRIAL NOT FINAL ORDER

An action was brought by the beneficiary upon a life insurance policy. Plaintiff received a verdict and judgment. Defendant filed a motion for new trial within ten days after the judgment was rendered. The trial court, in granting the motion, ordered the judgment vacated and a new trial granted on the grounds of newly discovered evidence and that the verdict and judgment were manifestly against the weight of the evidence. On appeal to the Court of Appeals for Hamilton County it was found that there had been no abuse of discretion by the trial court in granting the motion and the appeal was dismissed on the ground that it was not predicated on a final order. On appeal to the Ohio Supreme Court, *held,* affirmed. An order vacating a judgment and granting a new trial does not constitute a judgment or final order and Ohio General Code § 12223-2, providing that ". . . an order vacating or setting aside a judgment and ordering a new trial, is a final order. . . ." is unconstitutional. *Green v. Acacia Mutual Life Ins. Co.,* 156 Ohio St. 1 (1951).

Under the sponsorship of the Ohio State Bar Association, Ohio General Code § 12223-2, 117 Ohio Laws 615, effective August 23, 1937, was amended to read in part ". . . an order vacating or setting aside a general verdict of a jury and ordering a new trial, is a final order which may be reviewed. . . ." It was well established at that time that the jurisdiction of the court of appeals was limited by the Ohio Constitution to a review of judgments and final orders, and that the legislature had no power to limit or enlarge that jurisdiction. *Cincinnati Polyclinic v. Balch,* 92 Ohio St. 415, 111 N.E. 159 (1915). The court ruled this 1937 statute, *supra,* unconstitutional as a legislative attempt to enlarge the jurisdiction of the court of appeals, holding that to constitute a final order ". . . There must be a dismissal of the action or some judgment in the broadest sense, determining the ultimate rights of the parties. . . ." and that the granting of a new trial was merely an interlocutory step toward finality or judgment, and in the absence of abuse of discretion, does not constitute a final order. *Hoffman v. Knollman,* 135 Ohio St. 170, 20 N.E. 2d 221 (1939). This holding followed the doctrine initiated in *Conord v. Runnels,* 23 Ohio St. 601 (1873).

Section 6, Article IV of the Ohio Constitution was amended, effective January 1, 1945, to read ". . . The Courts of Appeals shall have. . . such jurisdiction as may be provided by law to review. . . judgments or *final orders* of. . . courts of record inferior to the Court of Appeals. . . ." (Emphasis supplied) The words "or final orders" were added by the amendment, although it had previously been held that the word "judgments" included "final orders." *Chandler & Taylor Co. v. Southern Pacific Co.,* 104 Ohio St. 188, 135 N.E.

620 (1922). This amendment removes from the constitution the determination of the appellate jurisdiction of the courts of appeals and authorizes the legislature to so determine, limited, however, as before, to judgments or final orders.

Sections 11575, 11576 and 11578 of the General Code were amended in 1945 resulting in a drastic change in our procedure in that a judgment is now rendered on the verdict *before* a motion for new trial may be filed. The effect of these changes is that a motion for new trial is no longer directed at the verdict but is now directed at the judgment and if favorably received, results in the vacation of that judgment. Ross, *Some Comments on Changes in Ohio Procedure,* 31 OHIO OP. 358 (1945).

It is clear that an "abuse of discretion" in granting a new trial is reviewable, but such term ". . . connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court. . . ." *Steiner v. Custer,* 137 Ohio St. 448, 31 N.E. 2d 855 (1940). For the purpose of making an order granting a new trial reviewable even in the absence of abuse of discretion, Ohio General Code § 12223-2, 122 Ohio Laws 754, effective September 30, 1947, was again amended to read, ". . . or an order vacating or setting aside a judgment and ordering a new trial, is a final order which may be reviewed. . . ." In the principal case, the court did not reach the issue of abuse of discretion by the trial court, but confined itself to the constitutional validity of this statute.

The issue as the court saw it, was, does the fact that a judgment is now rendered before a motion for new trial may be filed, invest that judgment with the attributes of a judgment or final order as those terms are used in the constitution. In answering this question in the negative, the court contends that a judgment is within the power of the trial court to vacate until the motion for new trial has been determined or until the period in which such motion may be filed has expired, hence, such a judgment lacks the requisite of finality. In effect, the court considers such a judgment as a mere *pro forma* judgment and as being completely extinguished when the trial court grants the motion for new trial. Having so disposed of the *pro forma* judgment, all that is left is the order granting a new trial which, as was determined in *Hoffman v. Knollman, supra,* is not a judgment or final order.

A sharp dissent is registered by three judges who attack primarily the premise of the court that a judgment rendered upon a verdict is a mere *pro forma* judgment. An order vacating a judgment rendered upon a motion for directed verdict or judgment notwithstanding the verdict, and granting a new trial is held to constitute a final order. *Cincinnati Goodwill Industries v. Neuer-*

man, 130 Ohio St. 334, 199 N.E. 178 (1935); *Michigan-Ohio-Ind. Coal Ann. v. Nigh,* 131 Ohio St. 405, 3 N.E. 2d 355 (1936); *Murphy v. Pittsburgh Plate Glass Co.,* 132 Ohio St. 68, 4 N.E. 2d 983 (1936). The dissent contends that a judgment rendered upon a verdict is of the same quality as that rendered upon a directed verdict, that it is rendered after a full hearing on the merits and that a party who loses such a judgment should be entitled to appeal before undergoing the expense and delay of a new trial.

It would seem that the court's adherence to a literal interpretation of final order as the criterion of appealability is not consonant with the basic doctrine that a litigant who has obtained a substantial legal right should not be deprived of that right without being allowed a review of the order so depriving him. That a judgment obtained upon a verdict is a substantial legal right cannot be denied, but as a result of this case, a constitutional amendment appears to be the only remedy.

Thomas T. Taggart

CRIMINAL LAW — EVIDENCE — "TRUTH SERUM"

Defendant was convicted of making and uttering a check drawn upon a bank in which he had no account. In the lower court defendant sought to introduce into evidence a report of statements he had made while under the influence of sodium pentathol, the so-called "truth-serum." The drug had been administered by a clinical psychologist. Counsel for defendant contended that the evidence was admissible on three theories: (1) on the theory of past recollection recorded, CALIF CODE OF CIVIL PROC. § 2047; (2) to show the facts upon which the psychologist based his opinion; and (3) that it was evidence that should be allowed defendant in support of his defense. The trial court excluded this evidence. On appeal *held,* affirmed. Even if the memorandum were admissible, which the court did not hold, it would not amount to reversible error in the absence of a showing of prejudice. *People v. McNichol,* 100 Cal. App. 554, 224 P. 2d 21 (1950).

Appellant's sole defense was that because of a state of self induced intoxication he had been unconscious of his acts. He testified that he had no recollection of his conduct at the time the alleged offense was committed. The court stated that since he had no recollection, any statements which he may have made were not made when the fact was fresh in his memory, nor could he say that the statements made were correctly reported, both of which are required by the California Code, *supra.* The court further pointed out that the record showed appellant had the report in his possession when he testified he had no recollection of his conduct at the time

in question, therefore the irresistible conclusion was that the report did not refresh his memory, nor could it since he had none. What was expected to be shown by the report was not proffered by the counsel for the appellant.

The psychologist testified that any person consuming the amount of liquor the evidence showed the appellant consumed would not have a conscious intent to defraud. The court was unable to determine how statements made by appellant during the experiment would have served to show facts upon which the psychologist based his conclusions; even if the notes would have shown a denial of the offense, it would be merely hearsay and a self-serving declaration, and hence inadmissible. In conclusion the court stated that it was well settled that the opponent, but not the offering party, had a right to have the jury see a paper to be used for refreshing the memory of the witness. *Reid v. Reid,* 73 Cal. 206, 208 14 Pac. 781 (1887).

The scientific use of durgs in eliciting truth began in Texas in 1922, although this function of the drug was discovered in 1916. From 1922 until the present the police have been using the drug as an aid in solving various crimes and inducing confessions.

In 1926 the Supreme Court of Missouri, in affirming a conviction for rape in which the defendant attempted to introduce in evidence the deposition of a doctor in support of his innocence, referred to the "truth-serum" as a clap-trap. In this case the defendant had denied his guilt while under the influence of the "truth-serum." The trial court excluded the evidence and the Supreme Court said, "Barring the sufficient fact that it cannot be otherwise classified than as a self-serving declaration," it is also, "in the present state of human knowledge, unworthy of serious consideration. The trial court therefore. . . ruled correctly in excluding this clap-trap from the consideration of the jury." *State v. Hudson,* 289 S. W. 920 (1926). Recently a defendant on trial for murder in Virginia offered results of the "truth-serum" test which had been made three months after indictment and nearly five months before defendant was tried. The Supreme Court of Appeals of Virginia held that the results were properly excluded, and pointed out that the record did not show what drug was used nor did it contain any evidence as to the reliability of the test; furthermore at times the defendant's answers were maudlin and obviously self-serving. *Orange v. Commonwealth,* 191 Va. 423, 61 S.E. 2d 267 (1950).

It has always been the policy of the law to be slow in accepting new scientific methods for discovering facts hidden from the lay person. A very common example is the use of fingerprints in determing identification. Fingerprints were first used officially to

record the identity of individuals in 1851, in India. In 1911 the Supreme Court of Illinois, considering the admissibility of evidence identifying the accused by means of fingerprints, held that although such evidence was not sufficient in itself it was admissible if combined with other evidence tending to establish identity. Of course this was after fingerprints had been used in police identification in the United States for many years. The court also stated that when photography was first introduced it was seriously questioned whether pictures thus created could properly be admitted in evidence, but that now they are admitted without question. *People v. Jennings,* 252 Ill. 534, 96 N.E. 1077 (1911). For a brief history of the use of fingerprints for identification see *People v. Sallow,* 10 Misc. 449, 165 N.Y. Supp. 915 (1917).

According to a recent experiment involving the use of sodium amytal conducted by Professor Frederich C. Redlich, of Yale University Medical School, it is the neurotic individual, especially one with strong feelings of depression, guilt, and anxiety who confesses when under the influence of sodium amytal. Some criminals are inclined to confess because they have a tendency toward self-punishment, or because of other underlying conditions of the mind. Persons with well integrated personalities were able to stick to a lie in spite of the drug. It was the opinion of Professor Redlich that the use of such testimony in court would not be justified without the supplementary testimony of a psychiatrist. Redlich, *Narcoanalysis And Truth,* AM. J. OF PSYCHIATRY Vol. 107 No. 8. Because the drug weakens inhibitions and stimulates the imagination, there is also a danger that the questions asked are too suggestive. See also Despres, *Legal Aspects of Drug Induced Statements,* 14 U. OF CHI. L. REV. 601 (1947); Gagnieur, *The Judicial Use of Psychonarcosis In France,* 40 J. CRIM. LAW 37 (1949).

In view of the above the Missouri Supreme Court may have been justified in declaring the evidence unworthy of consideration by the jury, especially considering the year of the decision. This may or may not be true today. If in the future scientists are in accord on the trustworthiness of the "truth-serum," then statements made under the influence of the drug should be admissible. See WIGMORE, EVIDENCE Sec. 841 (a) (3rd. ed. 1940). This should result notwithstanding the fact that such statements are presently considered to be within the rule against involuntary confessions, and also within the rule against self-serving declarations. It is exceedingly dubious that the omission by the court in the principal case of any statement concerning the accuracy or reliability of the "truth-serum" test is indicative of confidence therein.

Jack V. Danaher

EVIDENCE — ADMISSIBILITY — ILLEGALLY OBTAINED EVIDENCE

Defendant was convicted of having driven an automobile while under the influence of intoxicating liquor. The State's sole evidence was obtained as a result of an illegal arrest and the arresting officer's testimony. On appeal, *held,* reversed. Evidence obtained by a violation of constitutional guarantees is inadmissible if a timely objection is made thereto. *Rickards v. State,* 77 A. 2d 199 (Del. 1950).

Whether or not illegally obtained evidence should be admissible involves a policy judgment. The common law rule followed by a majority of the courts today is that such evidence is admissible. *People v. Defore,* 242 N. Y. 13, 150 N. E. 585 (1926); 8 WIGMORE, EVIDENCE §§ 2183, 2184 (3d ed. 1940). Courts taking the majority approach feel, as a matter of policy, that the overall social gain from crime detection through illegally obtained evidence outweighs the injustice done to one individual. *People v. Defore, supra.* These courts suggest increased criminal and civil sanctions against the peace officer who acts improperly as a means of protecting the individual who has been wronged. Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures,* 25 COL. L. REV. 11, 22 (1925). But wouldn't this tend to thwart their expressed policy? Wigmore's position is that the rules of evidence should not be an indirect sanction against the overzealous police officer. 8 WIGMORE, EVIDENCE § 2183 (3d ed. 1940). Finally, these courts hold the constitutional guarantee is to prevent an invasion of privacy and does not extend to returning seized property or preventing a further invasion by suppressing its use as evidence. *U. S. v. Snyder,* 278 Fed. 650 (N. D. W. Va. 1922). If this last judgment be true, then the only reason to exclude evidence would be this added sanction's tendency to prevent an initial invasion of privacy.

The Federal rule, which is followed by an ever increasing number of the states, would exclude such evidence on a constitutional basis. *Boyd v. U. S.,* 116 U. S. 616 (1886); *Weeks v. U. S.,* 232 U. S. 383 (1914). These courts favor a policy of individual protection over crime detection. There is a feeling also that this provides the only adequate sanction to control police officers. Atkinson, *supra.* Some say it is beneath the dignity of the law to stoop to the use of illegally obtained data to put a man behind bars. *Judicial Control of Illegal Search and Seizure,* 58 YALE L. J. 144 (1948). The Federal rule thus (1) maintains dignity in a court's action, (2) adds another sanction to deter overzealous officers, and (3) increases protection for individuals in the true spirit of the Constitution by preventing the use of the evidence after the initial invasion.

Until the principal case Delaware had followed the majority rule. *State v. Chuchola,* 2 Harr. 133, 120 Atl. 212 (1922); *State v. Epescopo,* 7 Harr. 429, 184 Atl. 872 (1936). This shift to the Federal rule is in line with the growing trend and, in the opinion of the writer, the better reasoned cases.

William H. Lutz, Jr.

JUDGMENTS — USE OF EXTRINSIC EVIDENCE TO IMPEACH THE VERITY OF THE RECORD

Plaintiff filed a supplemental petition pursuant to Ohio General Code Section 9510-4 against the Republic Mutual Insurance Company to satisfy a default judgment recovered against Miller, who was insured by Republic, for injuries received in an automobile accident. The judgment was predicated upon service purportedly made in conformity with Ohio General Code Section 6308-2 *et seq.,* which allows service upon the Secretary of State as the agent of non-resident motorists and resident motorists who conceal themselves, in actions arising out of the use of Ohio highways. Republic attacked the judgment on the ground that it was void because summons had not been mailed to Miller "at his last known address" within the meaning of Ohio General Code Section 6308-2, but rather to his last known residence address although plaintiff knew of a later business address used by Miller. However, both the sheriff's return and the record of the case affirmatively stated that service was had at defendant's "last known address." The municipal court held for defendant Republic but was reversed by the court of appeals. A motion to certify was allowed by the Supreme Court. *Held,* reversed. Where judgment is based upon service made pursuant to Ohio General Code Section 6308-2 it may be shown to be void by proof that service was not mailed to defendant "at his last known address" although such proof is outside of and contradicts the record. *Conner v. Miller; The Republic Mutual Insurance Company,* 154 Ohio St. 313, 96 N.E. 2d 13 (1950).

It is difficult to state any general rule concerning the definition of "last known address" because of the different language used in the various statutes relating to service of process. The principal case holds it to mean any address whatsoever and not merely defendant's last known residence address; further, the court held that a plaintiff is required at his peril to ascertain defendant's last known address as a matter of fact so far as it is reasonably possible to do so. *Hartley v. Vitiello,* 113 Conn. 74, 154 Atl. 255 (1931); *Crankhite v. Belden,* 193 Wis. 145, 211 N.W. 916 (1927).

At common law, the record imported absolute verity and could not be attacked. 3 Bl. Comm. 24, 3 Steph. Comm. 583; FREEMAN,

LAW OF JUDGMENTS § 122 (4th ed. 1892). A particular application of this was the conclusiveness accorded the sheriff's return. *Rex v. Elkins,* 2 Burr. 2129 (1767); *Bar v. Satchwell,* 2 Strange 813 (1728); Sunderland, *The Sheriff's Return,* 16 COL. L. REV. 281 (1916). Today, such verity is not given court records, and the weight of authority holds that the record may be impeached by extrinsic evidence in a direct attack upon the judgment. *Salladay v. Bainhill,* 29 Ia. 555 (1870); *Mullins v. Rieger,* 169 Mo. 521, 70 S.W. 4 (1902). *Contra: Moore v. Green,* 90 Va. 181, 17 S.E. 872 (1893). However, the older view still prevails for a collateral attack on a judgment, and a long procession of authority attests the verity and conclusiveness of the record. (*E. g.*) *Lake v. Tomes,* 405 Ill. 295, 90 N.E. 2d 774 (1950); *White v. White,* 294 Ky. 563, 172 S.W. 2d 72 (1943); *Cincinnati, S. & C. R. Co. v. Belle Centre,* 48 Ohio St. 273, 27 N.E. 464 (1891). *Contra:* RESTATEMENT, JUDGMENTS § 12 (1942).

The case law in Ohio concerning the use of extrinsic evidence to contradict the record seems to follow the differentiation made between direct and collateral attacks. The following cases hold that extrinsic evidence may be used to impeach the verity of the record in a direct attack in order to show that the court lacked jurisdiction thereby making the judgment void: *Lenz v. Frank,* 152 Ohio St. 153, 87 N.E. 2d 578 (1949); *Hayes v. Kentucky Joint Land Bank of Lexington,* 125 Ohio St. 359 (1932); *Kingsborough v. Tousley,* 56 Ohio St. 450, 47 N.E. 541 (1897). The principal case expressly overruled so much of *Hendershot v. Ferkel,* 144 Ohio St. 112, 56 N.E. 2d 205 (1944), as held the record conclusive in a direct attack.

The following cases hold that evidence dehors the record may not be used to impeach its verity in a collateral attack: *Cincinnati, S. & C. R. Co. v. Belle Centre, supra; Trinkle v. Longworth,* 13 Ohio St. 431 (1862); *Wainscott v. Young,* 74 Ohio App. 463, 59 N.E. 2d 609 (1944). However, the difficulty arises when the courts attempt to distinguish between direct and collateral attacks. A direct attack has been defined as an attempt to have a judgment or a decree declared void in a proceeding instituted for that specific purpose, whereas a collateral attack is an attempt to impeach the validity or binding effect of the decree as a side issue or in a proceeding instituted pirmarily for some other purpose. FREEMAN, LAW OF JUDGMENTS, § 306 (5th ed. 1925).

The confusion in Ohio began with *Kingsborough v. Tousley, supra,* where the defendant set up as a defense to an action on a prior *in personam* default judgment that the court in the former action had no jurisdiction of his person. The court held this to be a direct attack. Section 11, comment (a), of the *Restatement of Judgments* describes this defense as a collateral attack, but it would

seem that the court was correct in regarding it as an equitable defense, equivalent to an independent suit in equity to enjoin the enforcement of the judgment, and hence a direct attack upon it. In another portion of Section 11, comment (a), of the Restatement of Judgments the taking of independent proceedings in equity to prevent the enforcement of a judgment is given as an example of a direct attack. The reasoning in *Kingsborough v. Tousley, supra,* led to a logically dubious decision in *Lenz v. Frank, supra,* wherein the plaintiff brought an action to recover land which the defendant had purchased at a tax foreclosure sale. The plaintiff prayed that the two tax deeds be declared void. The court, quoting *Kingsborough v. Tousley, supra,* found this to be a direct attack and allowed the plaintiff to impeach the record with extrinsic evidence to show that proper service was not made upon her. Plaintiff's action in *Lenz. v. Frank* would seem to have been a collateral rather than a direct attack as her primary purpose was to recover the land, and the attack on the two tax foreclosure decrees was merely incidental to the real and true relief actually sought. Yet, in *Moor v. Parsons,* 98 Ohio St. 233, 120 N.E. 305 (1918), the defendant, who proceeded under Ohio General Code Section 11632 and asked that a mortgage foreclosure decree be set aside, was not allowed to use extrinsic evidence to show that service by publication was not had upon him in conformity with the controlling statute. The property in question had passed to purchasers in good faith. The court held that this was a collateral attack as interests of third parties had become involved. It was further held that since the record was in order Ohio General Code Section 11633 was controlling, because that section makes Ohio General Code Section 11-632 inapplicable where title to the property involved has passed to a purchaser for value. A more consistent approach would seem to be for the Ohio courts to allow extrinsic evidence to impeach the record in a collateral attack rather than characterize attacks as direct which by definition are collateral. New York has done this. *Ferguson v. Crawford,* 70 N. Y. 253 (1877); RESTATEMENT, JUDGMENTS, § 12 (1942).

In conclusion, the result of the principal case does not seem surprising as Republic's action was commenced while the proceeding was still pending and was therefore a direct attack. *Warren Tel. Co. v. Miller,* 96 N.E. 2d 430 (Ohio App. 1949). However, one important point of conjecture remains in Ohio. What would be the outcome of an "independent action in equity" by a defendant to a former mortgage foreclosure decree where he seeks to have this former decree declared void by using evidence outside the record to show that proper service by publication was never made upon him? Will the Ohio courts reaffirm *Moor v. Parsons, supra,* or will

they follow the reasoning of *Kingsborough v. Tousley, supra?* It would seem that the Ohio Supreme Court would, in such a case, be compelled to resolve this conflict.

John B. Dwyer

MUNICIPAL CORPORATIONS — POWERS UNDER HOME RULE WHEN NOT AUTHORIZED BY CHARTER

The commission of the City of Dayton, which by charter is the legislative body of that city, passed an ordinance directing that the city join the Municipal Finance Officers Association of Ohio and that the director of finance of the city issue a voucher in payment for such membership. The director of finance refused to comply on the grounds that such an expenditure is in no way authorized by the city charter and that it would be a misapplication of public funds. *Held,* the commission has the authority to make such an expenditure and the appropriation is for a public purpose. *State* ex rel. *McClure, City Manager, v. Hagerman, Director of Finance,* 155 Ohio St. 320 (1951).

Article XVIII, Section 3, of the Ohio Constitution states that "Municipalities shall have authority to exercise all powers of local self-government. . . ." The courts have held that this provision is self-executing in the sense that no further legislative act is required to render the powers of self-government available to a city. *State* ex rel. *Toledo v. Lynch,* 88 Ohio St. 71, 102 N.E. 670 (1913); *Perrysburg v. Ridgway,* 108 Ohio St. 245, 140 N.E. 595 (1923); *Mansfield v. Endly,* 38 Ohio App. 528, 176 N.E. 462 (1931), affirmed in 124 Ohio St. 652, 181 N.E. 886 (1931). Since the overruling of *State* ex rel. *Toledo v. Lynch, supra,* in *Perrysburg v. Ridgway, supra,* the decisions have consistently sustained the authority of a municipality to exercise the powers granted in Article XVIII, Section 3, of the Constitution without first adopting a charter under the provisions of Article XVIII, Section 7. *Perrysburg v. Ridgway, supra; Mansfield v. Endly, supra.*

A fact situation almost identical with that in the principal case was presented in *State* ex rel. *Thomas v. Semple, Director of Finance,* 112 Ohio St. 599, 148 N.E. 342 (1925). In that case the court held that the Director of Finance could not be forced to honor a voucher issued to cover the dues of the city of Cleveland in the Conference of Ohio Municipalities. The court based its decision on the ground that such an expenditure was not authorized by the city's charter. This decision was squarely overruled in the principal case.

It had been difficult from the first to reconcile the *Semple* case, *supra,* with the *Lynch, Ridgway,* and *Endly cases, supra.* If the

home rule powers granted by Article XVIII, Section 3, emanate directly from the Constitution and do not depend upon further legislative action or on the adoption of a charter it is hard to see why the failure to enumerate any one power in a charter should mean that the municipality in question can not exercise that power, assuming that there is no other reason for denying it. The *Semple* case, *supra,* has been criticized on this ground. Seasongood, *Cincinnati and Home Rule,* 9 OHIO ST. L. J. 98, 114 (1948). It is indicated in 28 Ohio Jurisprudence, Municipal Corporations § 128, p. 242, that it might be necessary to have a power enumerated in the charter in order that any specific body, such as the municipal council, might exercise it. Home rule power is derived directly from the Constitution; a charter serves simply to distribute and perhaps limit power within the municipal framework. It would seem that the broad grant of legislative power to the city commission or council found in the municipal charters would embrace the specific power in question. In the principal case, the Dayton city charter states that the commission is the legislative body of the city.

In North Carolina, which is not a home rule state, *Green v. Kitchen,* 229 N. C. 450, 50 S.E. 2d 545 (1948), held that a municipality had the implied power to appropriate money to send policemen to the National Police Academy for training as a result of the delegation to municipalities of the power to maintain law and order within their boundaries.

Aside from the above question, there is a problem raised by the rule that municipal funds can be expended only for a public purpose. *Cole v. La Grange,* 113 U.S. 1 (1884); *State* ex rel. *Toledo v. Lynch, supra.* Although the *Semple* case, *supra,* is often cited in support of this proposition, the opinion in that case seems to be based primarily upon the lack of authority in the charter rather than the purpose of the expenditure. The tendency of the modern cases is toward a liberal view of the question. This gives vitality to the proposition that the determination of what is a public purpose is primarily a legislative function. For example, payment of dues in a municipal league has been held a public purpose in *City of Glendale v. White,* 64 Ariz. 231, 194 P. 2d 435 (1948); *People* ex rel. *Schlaeger, County Collector v. Bunge Brothers Coal Co.,* 392 Ill. 153, 64 N.E. 2d 365 (1945); and *Hays v. City of Kalamazoo,* 316 Mich. 443, 25 N.W. 2d 787 (1947). The sending of municipal officers to attend conferences or training programs was held a public purpose in *City of Roseville v. Tulley, City Treasurer,* 55 Cal. App. 2d 601, 131 P. 2d 395 (1942); *People* ex rel. *Schlaeger, County Collector v. Bunge Brothers Coal Co., supra; Tousley v. Leach,* 180 Minn. 293, 230 N.W. 788 (1930); *Green v. Kitchen, supra.* An old Ohio case, which, in the light of the principal case is probably

no longer good law, held that a city is not liable for the expenses of a building inspector incurred at a convention of such officials. *State,* ex rel. *Marani v. Wright, City Auditor,* 17 Ohio Cir. Ct. (N.S.) 396 (1911).

The principal case, by holding that the power of a city to pay for membership in such organizations as the Municipal Finance Officers Association of Ohio does not depend on authorization in the charter, gives effect to the basic principles of home rule and adopts a liberal approach to the question of what constitutes a public purpose in municipal expenditures.

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