# Recent Decisions

## Constitutional Law

### Governmental Competition With Private Enterprise

Proceeding for the validation of county revenue anticipation certificates for the acquisition and construction of truck and railroad freight terminal facilities. The Georgia constitution of 1945 provides that such certificates can be issued only for the purposes expressly authorized by the "Revenue Certificate Laws of 1937," as amended in 1939. Ga. Code Ann., § 2-6005. The pertinent section of this act provides for the issuance of such certificates for the purpose of acquiring and constructing "highways, parkways, airports, docks, piers, wharves, terminals and other facilities." Ga. Code Ann., § 87-802(a)(2). The projected undertaking was to be a warehouse, part of the space of which was to be devoted to temporary storage of goods between their arrival by common carrier and their delivery. The remainder of the space, however, was to be leased to tenants on a permanent basis. The question was whether or not this warehouse was a "terminal." *Held,* judgment in favor of validation of the certificates was reversed. *Beazley v. DeKalb County,* 210 Ga. 41, 77 S.E. 2d 740 (1953).

The court invoked formal judicial methods of interpretation in formulating its definition of "terminal" as a place provided by or for common carriers for the purpose of receiving and discharging passengers and freight, including buildings and structures incidental to those purposes. The court did some sleuthing on its own to discover that the total warehouse space occupied by the common carriers serving the entire Atlanta area was 550,000 square feet, while the proposed warehouse, also in metropolitan Atlanta, was to cover 2,000,000 square feet. It concluded from these facts that the warehouse was not to be primarily a terminal, but a general warehouse.

Although the instant case was decided on the narrow issue of the validity of the revenue anticipation certificates, the closing paragraphs of the opinion reveal that the court did not feel this to be an appropriate governmental economic venture, regardless of the method of financing. It is the American heritage that government affords the framework in which the individual pursues his private interests, that the government does not compete economically with the individual. From the earliest days of our nation it has been held that there are limits to governmental intrusion into the capitalistic economy. This was regarded as a general rule of law, inherent in the Constitution. Early cases did not cite a specific constitutional provision upon which to bottom the restrictions, but

overturned excessive governmental participation on the basis of implicit limitations. *Olcott v. Supervisors,* 16 Wall. 678 (U. S. 1872); *Loan Ass'n v. Topeka,* 20 Wall. 655 (U. S. 1874). A catch-all phrase was first attached to this limitation about the middle of the 19th century. *Sharpless v. The Mayor,* 21 Pa. 147 (1853). "Public purpose" still stands today as the test of the legality of the government in business. The public purpose test soon found a concrete guardian. The Supreme Court of the United States, followed by the state courts, awoke to the proposition that the use of public funds for other than a public purpose violated the due process clauses of the federal and state constitutions. *Fallbrook Irrigation Dist. v. Bradley,* 164 U. S. 112 (1896). Later cases firmly established this approach. *Jones* v. *City of Portland,* 245 U. S. 217 (1917); *Green v. Frazier* 253 U. S. 233 (1920). The due process clause thus became the palladium of the free enterprise system. See Note, 41 HARV. L. REV. 775 (1928); Kneier, *Municipal Functions and the Law of Public Purpose,* 76 U. OF PA. L. REV. 824 (1928); McAllister, *Public Purpose in Taxation,* 5 SEL. ESSAYS OF CONST. LAW, pp 1-32 (1938), 18 CALIF. L. REV., pp. 137-148 and 241-254 (1930).

But the United States Supreme Court rendered a striking decision in *Nebbia v. New York,* 291 U. S. 502 (1934). This case practically removed the restrictions that had been read into the due process clause of the Federal Constitution. Asserting that "A state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare," the Court seemed willing to accept any economic system that the states may see fit to adopt, even state socialism. The upshot of this decision is that the due process clauses of the Federal Constitution no longer guarantee a competitive, or even a capitalistic, economy.

Even before *Nebbia v. New York, supra,* the Supreme Court had manifested a predilection toward the state courts' determination of public purpose. This was first clearly established in *Green v. Frazier, supra,* which affirmed the North Dakota Industrial Program, an extensive arrangement of public ownership. The Supreme Court of Nebraska was affirmed in permitting a municipality to operate a gasoline station, on the grounds that petroleum products are necessities. *Standard Oil Co. v. City of Lincoln,* 114 Neb. 243, 207 N.W. 172, 208 N.W. 962 (1926), *affirmed,* 275 U.S. 504 (1927).

Despite developments in the Supreme Court of the United States, many state courts still apply the public purpose test to governmental economic ventures. Thus the Supreme Court of Ohio finds in the state constitution all the restrictions that were once deemed a part of the Federal Constitution. The city of Cleveland was enjoined from engaging in the garage business, on the

grounds that it was not a public purpose. *City of Cleveland v. Ruple,* 130 Ohio St. 465, 200 N.E. 507 (1936). A later case has evinced a more liberal interpretation of public purpose, permitting the city of Columbus to operate an off-street parking lot, on the grounds that private enterprise had failed to meet the public need. *State ex rel. Gordon v. Rhodes,* 156 Ohio St. 81, 100 N.E. 2d 225 (1951). But the old test still stands in Ohio, and in many other states.

There is healthy disagreement among the state courts over where to draw the line of demarcation between public and private purpose. See Notes, 14 A.L.R. 1151 (1921), and 115 A.L.R. 1456 (1938). The tendency is to expand the public purpose category. Early cases stressed that a natural monopoly should exist before the government can engage in a particular enterprise. *Munn v. Illinois,* 94 U. S. 113 (1876). Later cases felt that the service rendered must be a necessity to the community. *Brass v. North Dakota,* 153 U. S. 391 (1894); *Standard Oil Co. v. City of Lincoln, supra.* Still another standard, the breakdown or failure of free competition, has received judicial consideration. *Jones v. City of Portland, supra; State ex rel. Gordon v. Rhodes, supra.* See McAllister, *supra.*

The closing paragraphs of the opinion in the instant case clearly asserted a conservative definition of public purpose by the Georgia court. It is the author's opinion that this particular municipal undertaking would not have been permitted, even if financed other than by revenue anticipation certificates, for it would have amounted to a step toward state socialism, clearly repugnant to the conservative position of the Supreme Court of Georgia.

*David G. Sherman*

CONSTITUTIONAL LAW — MUNICIPAL REGULATION — SOLICITING CONTRIBUTIONS FOR CHARITABLE PURPOSES

Action by the American Cancer Society to enjoin the enforcement of an ordinance regulating the solicitation of contributions for charitable purposes by prohibiting such solicitations without a license. The ordinance provided for a solicitation advisory board which should recommend a license only where it deemed the applicant a worthy agency in a charitable cause not already adequately covered. The board refused plaintiff's application for a license on the ground that it had failed to join the "community fund." The court of appeals affirmed the decision of the trial court which held that the board's action and ordinance were in violation of the provisions of the Constitution of Ohio and the Constitution of the United States. On appeal, *held* such an ordinance is void, since it authorizes a restraint upon the common right of charitable solicitation, as guaranteed by both the Ohio and United States Constitu-

tions. A licensing body must have fixed standards for determining whether a license is to be issued. *American Cancer Society v. Dayton,* 160 Ohio St. 114, 114 N.E. 2d 219 (1953).

The Supreme Court of Ohio in the principal case predicated its decision upon two grounds. The first reason for the decision was that the action taken by the board, which in effect denied the charitable organization the right to solicit unless it became a member of the community chest, violated substantive due process. Practically all constitutional guaranties are subject to police power and there is no doubt that charitable solicitation may be regulated. Previous cases construing the extent of this power over the person have held that cities may reasonably regulate the hours and places of such solicitations, *Ex parte Dart,* 172 Cal. 47, 155 Pac. 63 (1916); may restrain beggars, vagrants, and habitual drunkards, *Lawton v. Steel,* 152 U. S. 133, 136 (1884); and may prohibit house to house canvassing, *Prior v. White,* 132 Fla. 1, 180 So. 347 (1938). Indeed, it has been stated that a statute will be sustained as a proper exercise of the state's police power though objects affected by it may be wholly innocent. *Queenside Hills Realty Co. v. Saxl,* 328 U. S. 80 (1945). But this police power is definitely circumscribed when civil liberties are involved, *Hague v. C.I.O.,* 307 U. S. 496 (1939); legislative choice of policy in matters of civil organization is no longer essentially unrestricted. And the Ohio court is clear that, under the Federal and State Constitutions, the solicitation of funds and the dissemination of knowledge for and with reference to a worthy charitable organization are within the fundamental principles of liberty of action and freedom of speech and as such are embodied in the concept "due process of law".

Given these limitations on governmental power, the ordinance was too vague and indefinite to have a substantial relation to any permitted objective; it could be used not only to prohibit activities which the state may constitutionally proscribe but also those activities which government now has no right to prohibit. This is illustrated by the fact that a prior permit granted to the applicant was conditioned upon its becoming a member of the Community Chest. And although a licensing ordinance contains a proviso that it shall not apply to the annual campaign of the Community Chest it is still invalid because it grants immunities which are not equally applicable to all citizens and corporations. *Seattle v. Rogers,* 5 Wash. 2d 599, 106 P. 2d 598 (1940).

The second assigned reason for holding the ordinance invalid was the absence of sufficiently definite standards for the guidance of the board in the performance of its constitutional functions. This holding was based upon the reasoning of *Cantwell v. Connecticut,* 309 U. S. 626 (1940), which held that the nonexistence of definite standards allowed a discretion fatal to such legislation since it

would authorize a prior restraint upon the exercise of the guaranteed freedoms. The ordinance must state a standard for the guidance of the official who passes upon the application for the permit. *Hoyt Bros v. Grand Rapids,* 260 Mich. 447, 245 N.W. 509 (1942). The official board can exercise no unreasonable discretion but should be able to issue the certificate as a matter of course after a proper determination of the facts.

There has been a conflict among state court decisions as to the validity of the administrative provisions of ordinances regulating charitable solicitations. A Pennsylvania decision has sustained an ordinance exempting all charitable institutions from obtaining a license if they filed reports with the departments of state government, even though the licensing board ultimately determined the status of the alleged charity if it failed to file a report. *Commonwealth v. McDermott* 266 Pa. 299, 145 Atl. 858 (1929). Using different language the Supreme Court of Oklahoma stated that an ordinance was not invalidated merely because the board was allowed to determine what was worthy as distinquished from unworthy. *Ex parte White,* 56 Okla. Crim. Rep. 418, 41 P. 2d 488 (1935). An even more liberal attitude was shown in *Ex Parte Williams,* 345 Mo. 1121, 139 S.W. 2d 485 (1940), where the Supreme Court of Missouri held it was not necessary that a rule of conduct be prescribed where the power conferred was a police measure. No federal question seems to have been raised. The *Cantwell* case, *supra,* impliedly overruled these and other state court decisions which authorized a prior restraint upon the exercise of the common right of solicitation by allowing a board to appraise facts, form an opinion, and exercise judgment in determining whether a permit should be granted.

The principal case, by following the *Cantwell* case, *supra,* establishes the need in Ohio for at least a substantial relation between the permitted objective and the legislation regulating the civil organization.

*William F. Newman*

### Corporations — Doing Business — Solicitation on Television Broadcast

Plaintiff brought an action in Utah state court for injuries caused by the use of a hair preparation manufactured by a foreign corporation not registered under the incorporation laws of that state. Process was served on the local television station manager on the theory that since the defendant corporation had solicited orders through the station, the corporation was "doing business" within the meaning of the Utah statute. Rules of Civil Procedure, Rule 4(e) (4). All orders taken by the station when viewers called the number shown on the screen were forwarded to the defendant,

without additional charge, to be filled by C.O.D. shipments direct to the purchaser. The lower court quashed the service of process and plaintiff appealed to the Supreme Court of Utah. *Held,* mere solicitation on television by a foreign corporation did not constitute "doing business" within the meaning of Utah Code of Civil Procedure relating to service of process on a foreign corporation doing business in that state. *McGriff v. Charles Antell, Inc., Utah,* 256 P. 2d 703 (1953).

At one time, a corporation had no legal existence outside the state of incorporation, although it was subject to *in rem* jurisdiction with respect to its property in another state. *St. Clair v. Cox,* 106 U. S. 350 (1882). Today, however, a foreign corporation may be subjected to service of process under the doctrine that the corporation impliedly consents to service by "doing business" in the state. *Bank of America v. Whitney Bank,* 261 U. S. 171 (1923).

The expression, "doing business" within a state, may have one meaning when used in statutes which fix the conditions under which a foreign corporation may be admitted to do business in a state, and another meaning under statutes which provide for serving summons upon the managing agent of a foreign corporation present in a state. *Beach v. Kerr Turbine Co.,* 243 Fed. 706 (D.C. Cir. 1917). Mere solicitation of business by an unregistered foreign corporation is not "doing business" within the meaning of the qualification statutes. *Mandel Bros. v. Henry A. O'Neil, Inc.,* 69 F. 2d 452 (8th Cir. 1934).

As to what constitutes "doing business" for valid service of process, the decisions are conflicting and unsatisfactory. However, most states agree that mere solicitation does not constitute "doing business" for purposes of service of process. *Green v. Chicago, Burlington and Cincinnati R.R.,* 205 U. S. 530 (1906); See Notes, 46 A.L.R. 572 (1927), 60 A.L.R. 1038 (1929). But some courts have sustained the service of process where the solicitation was continuous and systematic. *International Shoe Co. v. Washington,* 326 U. S. 310 (1945). In *Frene v. Louisville Cement Co.,* 134 F. 2d 511 (D.C. Cir. 1943), the court stated that, "In general the trend has been toward a wider assertion of power over nonresidents and foreign corporations than was considered permissible when the tradition about 'mere solicitation' grew up.... It would seem, therefore, that the 'mere solicitation' rule should be abandoned when the soliciting activity is a regular, continuous and sustained course of business...."

A different holding occurred in a case somewhat similar to the principal case, *Union Mutual Life Ins. Co. v. District Court of Denver,* 97 Colo. 108, 47 P. 2d 401 (1935). There a life insurance company was advertising over the radio under a contract similar to the one in the principal case, with the exception that the radio

station received a commission on all policies sold. The Supreme Court of Colorado held this activity to be within the scope of a Colorado statute which provides that service may be had upon an agent of a foreign corporation "doing business" in the state.

The Ohio law on the question of what constitutes "doing business" in the state for purposes of service of process is also rather uncertain. The Ohio courts have said that the service of process statute, OHIO REV. CODE § 2703.12, should be liberally construed to facilitate the obtaining of jurisdiction over a foreign corporation "doing business" in Ohio. *Simonsen v. Gulf Refining Co.*, 23 Ohio Op. 486 (1942); *Bach v. Friden Calculating Mach. Co.*, 167 F. 2d. 679 (6th Cir. 1948). In the latter case, the court held that the fundamental principle underlying the "doing business" concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities. This seems to adopt the rule of *Frene v. Louisville Cement Co., supra.*

By the recent enactment of OHIO REV. CODE § 1703.191 (1953), Ohio has made it much easier to obtain personal jurisdiction once the fact of "doing business" is established. This section provides for service upon the Secretary of State as the agent of an unlicensed foreign corporation doing business in Ohio.

How much the law will change in the next few years on the question of what constitutes "doing business" is a matter of speculation. The principal case merely reaffirmed the majority rule which requires something more than "mere solicitation" for valid service of process.

*Howard Webster Bernstein*

DOMESTIC RELATIONS — THE EFFECT OF INCEST STATUTES ON THE RECOGNITION OF FOREIGN MARRIAGES.

Respondent and decedent, his niece, who were domiciled in New York, went to Rhode Island and were married. Marriages are permitted in Rhode Island between Jewish people within the degrees of affinity and consanguinity allowed by their faith. R. I. GEN. LAWS, c. 415, § 4. Shortly after the marriage, they returned to New York where they resided until decedent's death. Petitioner, one of their children, sought to be made administratix, contending the marriage was void in New York because of statutes which prohibit marriage and declare cohabitation a felony between persons of such a close relationship. N. Y. DOM. REL. LAW § 5 (3); N. Y. PENAL LAW § 1110. The Court of Appeals of New York affirmed a decree denying the petition, *holding* that the marriage was valid for the reasons that it was not repugnant to natural law and that the New York statutes, *supra,* have no extraterritorial force. *In re May's Estate,* 305 N. Y. 486, 114 N.E. 2d 4 (1953).

The law which will control in cases of this type is the conflict of laws rule of the parties' domicile. GOODRICH, CONFLICT OF LAWS (3d ed., 1949) p. 348. The most common conflict rule is that a marriage valid where celebrated is valid everywhere, *i.e.*, the domestic law of the state of celebration will control. There are, however, two exceptions to this rule. The first would declare the marriage void if it is either polygamous or incestuous within the degrees of consanguinity prohibited by the laws of Christendom. The second exception applies to statutes, based on strong public policy, which expressly prohibit the marriage. *Osoinach v. Watkins*, 235 Ala. 564, 180 So. 577, 117 A.L.R. 179 (1938); *Fensterwald v. Burk*, 129 Md. 131, 98 Atl. 358, 3 A.L.R. 1562 (1916); *Cunningham v. Cunningham*, 206 N. Y. 341, 99 N.E. 845 (1913); RESTATEMENT, CONFLICT OF LAWS § 132. In the absence of statutes, marriages between persons in a direct line of consanguinity or immediate collaterals (brother and sister) would be declared incestuous and void. *Commonwealth v. Lane*, 113 Mass. 458, 18 Am. Rep. 509 (1873). The "Law of Christendom" apparently is not the Bible, because it would prohibit marriages between a nephew and his aunt, although there is no prohibition on marriage between an uncle and niece. LEVITICUS, 18: 12, 13, 14; 20: 19, 20. The differentiation may well be based on the view toward polygamy at the time, wherein males were allowed multiple wives, but a woman could have only one husband. The fourteenth verse of Chapter 18 of Leviticus which provides: "Thou shalt not uncover the nakedness of thy father's brother, thou shall not approach to his wife: she is thine aunt" must be read as a whole, and is merely an affinity prohibition against marriage to the wife of an uncle.

The courts have split on the application of the second exception. One group would say that the statute must expressly declare that it applies to foreign marriages before it can invalidate them. *In re May's Estate, supra; In re Miller's Estate*, 239 Mich. 455, 214 N.W. 428 (1927). The other position is that if the statute represents a strong policy of the jurisdiction, then foreign marriages in violation of the statute will be void, even if they are not covered by the express terms of the statute. *Osoinach v. Watkins, supra.* This split is applicable to incest statutes, even if the relationship is declared to be a felony. *In re May's Estate, supra.* Statutes involving the capacity of the parties to contract the marriage are the ones with which the exception is concerned. On the other hand the *lex loci* rule is applied almost unanimously to statutes dealing with form and ceremony. *Fensterwald v. Burk, supra.* The proper interpretation of the second exception would be to apply it only when the statute expressly refers to foreign marriages because of the desire to uphold the marriage if possible, the lack of relation of domestic law of the domicile if the parties do not intend to return,

the ease of providing for this in a statute, and the ease of interpretation such a provision would provide.

The *lex loci* rule has been severely criticized, because of the complete irrelevance of the law of the place of celebration to the parties who are not going to remain in that jurisdiction. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, c. XVII (1942). It may be said, however, that this rule tends to uphold marriages, thus alleviating the serious problems created by void marriages. The exceptions to the rule present the most difficulty, but if the marriage were only voidable if under one of the exceptions, the problem of void marriages would be met and still there would be a method to dissolve marriages which are naturally abhorrent. *Walker v. Walker*, 84 N.E. 2d 258 (1948).

There are various alternatives to the *lex loci* rule. One suggestion is that the domestic law of the intended family domicile should be controlling on the issue of validity of the marriage. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, c. XVII, (1954). The underlying theory being that the only state with a real interest in the marriage is where the parties will live during coverture. This approach presents the problem of proving what was to be the domicile, although this would probably be resolved before an action arose. This approach offers no solution to the question of the effect of the parties moving from the intended domicile, and ignores the policy consideration of declaring the marriage valid if at all possible. GOODRICH, CONFLICT OF LAWS, p. 358 (3d ed., 1949). Some English and a few American cases would hold that the domestic law of the spouses' domicile would control. *Brook v. Brook*, 9 H.L. Cas. 193, 11 Eng. Rep. 703 (1861); *Weiss v. Weiss*, 8 Pa. D. & C. 534 (1926). This approach seems to have all the vices and none of the virtues of the other suggested panaceas. STERMBERG, PRINCIPLES OF CONFLICT OF LAWS, pp. 262-267 (1937); GOODRICH, CONFLICT OF LAWS, pp. 351-368 (3d ed. 1949); SELECTIONS FROM BEALE'S TREATISE ON THE CONFLICT OF LAWS, §§121.21, 129.1, 132.5, 136.6, 133.1 (1935).

Eleven states and the District of Columbia have adopted statutes which declare marriages void that are entered into by their citizens to evade local laws. For example, see WIS. STAT. § 245.04 (1949). There was a Uniform Marriage Evasion Act, but it was withdrawn from the active list in 1943 because so few states had adopted it. These statutes distinguish between those who leave to evade and plan to return; those who were validly married while domiciled elsewhere and subsequently moved to the state; and those residents who leave to get married but have no intention to return. Very hard results may be reached under these statutes, due to the fact the marriage is declared absolutely void. *Meisenhelder v. Chicago & N.W. R.R.*, 170 Minn. 317, 213 N.W. 32, 51

A.L.R. 1408 (1927). The "evasion" type act, if limited to more serious defects in the marriage, might be a very valuable aid. W. VA. CODE § 46966 (1949).

Eight states have incorporated the *lex loci* rule into their statutes with either none or only part of the first exception. For example: Baldwin's KY. REV. STAT. §402.040 (Baldwin, 1943). These states may have a serious problem of statutory interpretation. Rhode Island and Georgia are the only states in which an uncle and niece may be married, but in both states a nephew could not marry his aunt. In Georgia, however, it does not appear that such marriages would be limited to members of the Jewish faith. GEORGIA CODE ANN. c. 53, §102. Most of the states have no affinity provisions, and of those that do, several severely limit their effect, *Back v. Back,* 148 Iowa 223, 125 N. W. 1009 (1910); *Noble v. State,* 22 Ohio St. 541 (1872).

Ohio is rather indefinite on this point. Our statutes are very similar to those in the case noted. OHIO REV. CODE §§3101.01 (8001-1), 2905.07 (1302.3). An early Ohio case held that a man would be guilty of incest even if he were married to his niece in a country where such marriages were valid. *State v. Brown,* 47 Ohio St. 102, 23 N.E. 747 (1890). The later cases seem to express the same view. *Courtright v. Courtright et al.,* 11 Ohio Dec. Rep. 413; *Heyse v. Miclialske,* 31 Ohio L. Abs. 484, 18 Ohio Op. 254, (1940).

The complete answer to the question here involved is uniformity of marriage laws. This is very unlikely to occur. Of the various other approaches to the problem, I believe that the *lex loci* rule with a provision that the marriage be voidable by public action in extreme cases is the next best solution. The Ohio view is very strict and should be changed to prevent the great injustices which could arise in fact situations similiar to the principal case.

*David W. Carroll*

### EVIDENCE — ADMISSIBILITY OF RADAR EVIDENCE OF A VEHICLE'S SPEED

Defendant Moffitt was prosecuted for operating his automobile at an unlawful rate of speed in Kent County, Delaware. The state's evidence to substantiate its charge rested in part on a test made by two highway troopers using an electronic radar speedmeter. *Held,* an electronic radar speedmeter, if properly functioning and properly operated is a device that the jury may find to be a correct recorder of speed of one charged with operating an automobile at an unlawful rate. *State v. Moffitt,* 100 A. 2d 778 (Del. 1953).

For obvious reasons the admission of evidence derived from the use of a radar speedmeter has been rarely questioned beyond the trial court level. A convicted defendant is not likely to carry

his case to a higher court to avoid paying a fine. Hence the legality of such evidence can be measured only by examining the judicial standards previously laid down for the use of other scientific devices.

The dangers inherent in expert testimony grounded on scientific tests, especially where a jury is concerned, have resulted in the rule that general scientific recognition of the accuracy of a device is necessary for the admission of any evidence obtained by its use. *Frye v. United States,* 293 Fed. 1013 (D.C. Cir. 1923); see Note, 34 A.L.R. 145 (1925). And the scientist rather than the court is considered best able to determine the soundness of any new apparatus. *State v. Bonner,* 210 Wis. 651, 246 N.W. 314 (1933). Under this rule evidence has been admitted as to fingerprinting. *State v. Huffman,* 209 N.C. 10, 182 S.E. 705 (1935), handwriting, *In re Connor's Estate,* 105 Neb. 88, 179 N.W. 401 (1920) and ballistics, *Burchett v. State,* 35 Ohio App. 463, 172 N.E. 557 (1930). Chemical analysis of body fluids to determine intoxication is also generally admitted. *Kirschwing v. Farrar,* 114 Colo. 421, 166 P. 2d 154 (1946). However, in some instances, notably in the case of the lie detector, courts have refused to find the necessary scientific recognition of accuracy although much scientific data sustains its probative value. *People v. Becker,* 300 Mich. 562, 2 N.W. 2d 503 (1942); and see Smallwood, *Lie Detectors: Discussions and Proposals,* 29 CORNELL L. Q. 535 (1944). Although radar is generally accepted for many purposes, it remains to be seen if the appellate courts will sustain the recognition accorded the radar speedmeter in *State v. Moffitt, supra.*

Whether a court accepts the accuracy of the speedmeter without question or does so only after expert testimony on the point, further problems may arise in sustaining conviction based upon such evidence. Two of these difficulties, which were passed over lightly at the trial court level of *State v. Moffitt, supra,* became leading issues in a recent New York Supreme Court reversal of a radar speedmeter conviction. *People v. Offermann,* 204 Misc. 769, 125 N.Y.S. 2d 179 (1953).

Scientific evidence must be introduced through an expert witness, *Conley v. Commonwealth,* 265 Ky. 78, 95 S.W. 2d 1094 (1936), and the length and quality of training given a police officer in the operation of the speedmeter raises some doubts as to his qualifications as expert witness. See comment, 30 N.C. L. REV. 385 (1952). According to *State v. Moffitt, supra,* the fact that the officer making the test is not skilled in electronics should not render the test inadmissible. Many courts may not be willing to go this far. Certainly if the officer tries to testify beyond the bare facts of the test, he may find himself disqualified. In *People v. Offermann, supra,* the acting chief of the police department's radio division who had been concerned with radio since 1910 but possessed no formal train-

ing in radio or electronics was held not qualified to testify concerning the accuracy of the device.

While the prosecution may not have to prove the general scientific accuracy of the radar speedmeter, it *must* prove the accuracy of the particular speedmeter used. *State v. Moffitt, supra* mentions only that the speedmeter used had been tested within a reasonable time from the date of its use and method of proof is not explained. Direct testimony by the officers making the test would seem to be the simplest method. However, in *People v. Offermann, supra,* the testimony of the officer driving the police automobile used in testing the radar device that the automobile speedometer agreed with the reading of the device as relayed to him over a radio by the operator of the device, and the testimony of the operator that the device read the same as the speedometer reading relayed to him by the other officer was held to be hearsay and improperly admitted by the trial court.

Whether or not this testimony be regarded as hearsay, there seems to be no valid reason for refusing to receive it in evidence. Although officer A may no longer remember the speed he reported to officer B, he is present and able to testify directly as to the correctness of that statement when he made it. B can testify directly to the agreement between A's statement and his own speed reading. The difficulty arises in B's testimony concerning A's report to him. Clearly if B had made a written memorandum of A's speed report, there would be no question that such memo supported by the joint testimony of the two officers would be admissible. WIGMORE, EVIDENCE §751 (3rd ed. 1940). If the memo had later been lost, B could testify to the contents from memory. *Putnam v. Moore,* 119 F. 2d 246 (5th Cir. 1941). The present case requires one step further — B must depend on his memory alone to reproduce A's statement. It is hard to see how this situation makes cross-examination more difficult or evaluation of the facts less reliable than in the case of a lost memorandum. *Shear v. Van Dyke,* 10 Hun. 528 (N.Y. 1877); *Hart v. Atlantic Coast Line R.R.,* 144 N.C. 91, 56 S.E. 559 (1907); Morgan, *Hearsay and Preserved Memory,* 40 HARV. L. REV. 712 (1927); and see Note, 28 IOWA L. REV. 530 (1943).

In sustaining a conviction obtained through radar evidence, a court must therefore be satisfied that a general scientific recognition of the device exists, be prepared to accept the "expert" testimony of police operators and officers, and admit testimony which approaches the realm of hearsay, — all of which makes a conviction based on radar evidence less of a hopeless case than it appears to the average defendant.

*Mildred Mangum*

FEDERAL COURTS — VENUE — NON RESIDENT MOTORIST STATUTE

Plaintiff, an Illinois corporation, sued defendants, residents of Indiana, in the United States District Court for the Western District of Kentucky for damages arising out of the operation of defendant's truck in Kentucky. Service of process was made under FED. R. CIV. P. 4(d) (7), which states that service upon any competent person or upon a corporation is sufficient "if the summons and complaint are served in the manner prescribed by the law of the state which the service is made..." This was in accordance with KY. REV. STAT. §§188.020, 188.030 which provide for service upon the Secretary of State in a civil action against non-resident motorists arising out of the operation of a motor vehicle on the highways of the state. The defendant's motion to dismiss upon grounds of improper venue was overruled, and judgment was entered for the plaintiffs. This judgment was affirmed by the court of appeals and defendants appealed to the Supreme Court. *Held,* reversed. Defendants are not Kentucky residents within the meaning of the federal venue statute which confines such suits to "the judicial district where all plaintiffs or all defendants reside." 28 U.S.C. § 1391 (a). The non-resident defendants did not waive their federal venue privilege or voluntarily consent to suit by operating a truck upon the Kentucky highways. In a dissenting opinion, Mr. Justice Reed with the concurrence of Mr. Justice Minton stated that the implied appointment of an agent for service of process in the state courts was a waiver of the federal venue privilege. They reasoned by analogy from *Neirbo Co. v. Bethlehem Shipbuilding Corp., Ltd.,* 308 U.S. 165 (1939) which held that the formal designation of an agent for service of process constituted a waiver of federal venue. *Obderling v. Illinois Cent. R.R.,* 345 U.S. 950 (1953).

The first modern non-resident motorist statute was enacted by Massachusetts, MASS. GEN. LAWS, c.90, as amended by 1923 MASS. STAT., c. 431, § 2. In the event of an accident involving a resident and non-resident of a state, provision was made for the service of process on the Registrar of Motor Vehicles who would then send a copy of the same by registered mail to the non-resident defendant. The avowed purpose of the statute was to provide a reasonable method for protecting persons and property within the state from injury inflicted by non-residents who drive automobiles within the state. See Scott, *Jurisdiction Over Non-resident Motorists,* 39 HARV. L. REV. 563 (1926).

It was early held that the presence of a person within the jurisdiction was required for a valid exercise of in personam jurisdiction. *Pennoyer v. Neff,* 95 U.S. 714 (1878). However, the contitutionality of the non-resident motorist law was sustained in *Hess v. Pawloski,* 274 U.S. 352 (1927), which stated that the use of the

state highways by a non-resident was equivalent to his appointing the state registrar his attorney for the service of process. A later case added weight to this contention in holding that since the state has the power to exclude a non-resident motorist altogether, it may declare that the use of the highways is the equivalent to appointing an officer as their agent. *Penn. Fire Insurance Co. v. Gold Issue Mining Co.*, 243 U.S. 93 (1917). It would seem that the true basis of jurisdiction over the non-resident, however, is the driving of an automobile within the jurisdiction which is considered a dangerous act. Since this decision all of the states have adopted similar statutes. For a table of these acts see Note, 82 A.L.R. 769 (1933).

Many states have passed laws with provisions similar to those of the non-resident motorist statutes affecting non-resident corporations. These laws provide that a non-resident doing business within a state shall appoint an agent for the service of process. If an agent is not appointed, the corporation by doing such business within the state shall be deemed to have thereby appointed an officer of the state as its agent for the service of process. See, *eg.* OHIO REV. CODE § 1703.191. The *Neirbo* case, *supra*, held that a designation by a foreign corporation, in conformity with a valid statute of a state and as a condition of doing business within it, of an agent upon whom service of process could be made was an effective consent to be sued in the federal courts of the state. The court in *Knott Corporation v. Furman*, 163 F. 2d 199 (4th Cir. 1947), *cert. denied*, 332 U.S. 809 (1947), went even further, stating that "the consent to suit and service of process implied from doing business in a state by a foreign corporation not only authorizes a suit in the courts of the state, with service of process upon designated state officers, but also waives the provisions of the federal venue statute so that suit can be brought in federal court if elements of federal jurisdiction are present." Although it would seem that the actual constitutional basis of the in personam jurisdiction was the activity of the corporation within the state, the court grounded its opinion on the theory of an implied consent.

This consent theory, though denounced as being a legal fiction by many writers and judges, (*Flexner v. Farson*, 248 U.S. 289, 293 (1919), was the basis for nearly all of the United States District Court decisions holding the federal venue privilege to be waived under the non-resident motorist statute. *Steele v. Dennis*, 62 F. Supp. 73 (D. Md. 1945). *Urso v. Sealers*, 90 F. Supp. 653 (E.D. Penn. 1950); *Morris v. Sun Oil Co.*, 88 F. Supp. 529 (D. Md. 1950). The gist of the consent theory seems to be that the operation of a vehicle on the highways of the state is a voluntary act performed by the non-resident motorist manifesting "consent" to be sued as

part of a bargain by which the motorist is permitted to use the highways within the state.

The federal courts of appeals have failed to follow this consent theory. They theorize that the basis of the state's jurisdiction is either the power to exclude the motorist or its general police power. Regardless of the theory, the act of driving in the state is a sufficient basis for exercising jurisdiction, and the implication of consent is deemed neither necessary nor accurate. Since no consent to be sued in the state is found to exist, the party is not held to have waived the federal venue statute and therefore must be sued in the district where either he or the plaintiffs reside. *Martin v. Fischback Trucking Co.*, 183 F. 2d 53 (1st Cir. 1950); *McCoy v. Silver*, 205 F. 2d 498 (1953), *cert. denied*, 346 U.S. 872 (1953).

Logically, it would seem that this latter view, adopted by the Supreme Court in the present case, is the better one. This position recognizes that the actual basis for the exercise of the jurisdiction is the activity within the state, and disregards the theory of a fictional consent to jurisdiction. From the practical point of view, however, the fictional waiver of venue has been followed with desirable results. The litigation could be settled much more expeditiously in the district courts of the state where the accident occurred. The ideal solution would seem to be appropriate federal legislation amending the federal venue statute.

*Robert Hill*

### Limitation of Actions — Quasi In Rem Proceeding Effect of Saving Statute

The plaintiff brought an action against Standard Drug Company for personal injuries sustained from using a compound manufactured by The Toni Company and sold to the plaintiff by Standard Drug Company. Over two years after the injury, the plaintiff filed an amended petition naming The Toni Company as a new defendant and several retail stores as garnishees. Since the defendant, The Toni Company, was a foreign corporation not licensed or authorized to do business in Ohio, service of summons by publication was initiated and an affidavit of attachment was filed to attach assets in the jurisdiction of the court belonging to the defendant but in the possession of the retail stores. By special appearance, the defendant moved to quash the service of summons and to dismiss the petition on the grounds that the action had not been commenced within the two year period prescribed in Ohio Rev. Code §2305.10 (11224-1) and that the facts did not bring the case within the saving statute, Ohio Rev. Code §2305.15 (11228). This statute provides that "When a cause of action accrues against a person, if he is out of the state ... the period of limitation for commencement

of the action... does not begin to run until he comes into the state..." The common pleas court quashed the service of summons, entered judgment for the defendant and discharged the attachment. The court of appeals reversed and remanded with instructions to vacate the order. On appeal the Supreme Court *held*: (1) that OHIO REV. CODE § 2305.15 (11228) applied to corporations; and (2) that this statute was applicable to a quasi in rem attachment proceeding which was incidental to an action in personam. *Moss v. Standard Drug Co.* 159 Ohio St. 464, 112 N.E. 2d 542 (1953).

At common law the term "person" prima facie included both natural and artificial persons and therefore included corporations. *Department of Highways v. Lykes Bros. S. S. Co.*, 209 La. 381, 24 So. 2d 623 (1945); 13 AM. JUR., Corporations §9. This rule has been adopted by statutory enactment in Ohio. OHIO REV. CODE §1.02 (10213). The Ohio courts have also construed "persons" to include corporations where such a construction is consistent with the legislative intent. *Cincinnati Gaslight and Coke Co. v. Avondale*, 43 Ohio St. 257, 1 N.E. 527 (1885); *Ohio Farmers Ins. Co. v. Hard*, 59 Ohio St. 248, 52 N.E. 635 (1898).

In an action on a cognovit note after the fifteen year statute of limitations had expired, the court decided that the statute of limitations was suspended during the defendant's absence from the state, in spite of the fact that the plaintiff could have taken a cognovit judgment on the note at any time. *Commonwealth Loan Co. Inc. v. Firestine*, 148 Ohio St. 133, 73 N.E. 2d 501 (1947). The court reasoned that had the legislature intended to remove such causes of action from the operation of the saving statute they could have done so by appropriate language. In other recent cases the court has construed OHIO REV. CODE §2305.15 (11228) literally and has refused to read exceptions into the statute. *Couts v. Rose*, 152 Ohio St. 458, 90 N.E. 2d 139 (1950); *Meekison v. Groschner*, 153 Ohio St. 301, 91 N.E. 2d 680 (1950). In the *Couts* case, *supra*, the plaintiff was injured in Ohio by defendant, a non-resident motorist. The plaintiff could have brought an action against the defendant in Ohio under the provisions of the Ohio non-resident motorist statute, OHIO REV. CODE §2703.20 (6308-1). Nevertheless, the court held that the plaintiff did not have to bring the action within two years after the injury but could rely on OHIO REV. CODE §2305.15 (11228).

The majority of American courts have held, in the absence of express statutory provisions to the contrary, that where the defendant was absent from the state the statute of limitations should be suspended regardless of whether the action is in personam, quasi in rem or in rem. Thus the statute has been tolled although the defendant had property within the state which could have been subjected to attachment or garnishment during the statutory period.

See Note, 119 A.L.R. 337 (1939). But in an Ohio case, the statement appears in the opinion (although not carried into the syllabus) that the saving statute applies only to actions in personam. *Crandall v. Irwin,* 139 Ohio St. 253, 39 N.E. 2d 608 (1942). This was an action to foreclose a mechanic's lien on real estate, an action in rem. The court held that the six year limitation prescribed in OHIO REV. CODE 1311.13 (8321), extinguished the right, and not merely the remedy, and that the saving statute applied only to limitations contained in the general limitations of actions chapter, OHIO GEN. CODE §§11218 to 11236 inclusive, now OHIO REV. CODE §§ 2305.04 to 2305.14 inclusive and 1307.08.

In the instant case, the Supreme Court rejected the contention that the action was in rem and that therefore the saving statute was not applicable. The court in the principal case distinguished the *Crandall* case, *supra,* by holding that the attachment proceeding was a quasi in rem action rather than an in rem proceeding. The statement in the *Crandall* case, *supra,* to the effect that OHIO REV. CODE § 2305.15 (11228) applies only to actions in personam, whether it be regarded as dictum or as an alternative ground of decision, seems directly opposed to the position taken later by the Supreme Court in the *Firestine, Meekison and Couts* cases, *supra.* These three cases hold that no exceptions should be read into the saving statute, OHIO REV. CODE 2305.15 (11228). By distinguishing the *Crandall* case, *supra,* the Supreme Court refused to extend the doctrine of that case. Instead, it continued the approach of the *Firestine, Meekison* and *Couts* cases, *supra.* By its decision in the instant case, the Supreme Court has moved closer to a complete adoption of the majority American rule.

*Carl V. Bruggeman*

### LOCAL GOVERNMENT LAW — ZONING ORDINANCE CONSTITUTIONALITY

By an ordinance, the Village of Mayfield Heights prohibited absolutely the removal of topsoil from land located in areas designated as higher use districts. An action was brought by a dealer in topsoil challenging the constitutionality of the ordinance. While the suit was pending, the village council repealed the law prohibiting removal and enacted in lieu thereof a law merely regulating topsoil removal. To comply with this ordinance it was necessary, *inter alia,* to post a bond of five hundred dollars for each acre of land to be stripped, and to provide for drainage, reseeding, and payment of inspection expenses incurred by the village. Before a permit would be granted, it was provided that the building inspector should investigate the application and report his findings to a board of zoning appeals, who upon a favorable determination would grant a permit.

Thereafter, plaintiff filed a supplemental petition similarly attacking the amended ordinance. *Held,* the ordinance does not violate the due process clause of the Fourteenth Amendment of the United States Constitution as the restriction is reasonably related to the protection of the health, safety and welfare of the village. *Miesz v. Mayfield Heights,* 92 Ohio App. 471, 111 N.E. 2d 20 (1953).

Municipal corporations have power to enact zoning ordinances under the authority of state constitutional provisions and statutes delegating police power to them. *Rozeval Realty Co. v. Klienert,* 268 U.S. 646 (1932); *Synod of Ohio v. Joseph,* 139 Ohio St. 299, 39 N.E. 2d 515 (1942); *McCord v. Ed Bond Co.,* 175 Ga. 667, 165 S.E. 590 (1943).

The issue in each case involving the validity of a zoning ordinance is whether the restraint upon the use of the land is a reasonable interference with the owner's rights. *Pittsfield v. Oleksak,* 313 Mass. 543, 47 N.E. 2d 930 (1943); see Note, 168 A.L.R. 1188 (1947); see also John McCarthy, *Legal Background of Zoning in Ohio,* 23 OHIO BAR 563, for a review of Ohio cases. If an ordinance promotes the convenience or the general welfare of a relatively large portion of the population, or has a tendency directly or indirectly to advance the public interest, it is said to be within the police power of the municipality. *Bacon v. Walker,* 204 U. S. 311 (1907); *Pritz v. Messer,* 112 Ohio St. 628, 149 N.E. 30 (1925). Nevertheless, great financial loss should not be inflicted where the benefit to a large segment of society is negligible. *Pittsfield v. Oleksak, supra; West Bros. Brick Co. v. Alexander,* 169 Va. 271, 192 S.E. 881 (1937); *Terrace Park v. Evertt* 12 F. 2d 240 (6th Cir. 1926), *cert. denied,* 243 U.S. 710 (1926). In the *Terrace Park* case, *supra,* an ordinance, which prohibited the removal of gravel from land that was unfit for residential purposes due to passing trains and a nearby rubbish dump, was overthrown on constitutional grounds. The value of the land for use as a gravel pit was about ten times greater than for any other purpose to which it could be put.

The constitutionality of an ordinance regulating the removal of topsoil was raised in Ohio for the first time in the instant case. However, the lower courts of New York considered this question in *Lizza v. Town of Hempstead,* 175 Misc. 383, 23 N.Y.S. 2d 811 (1947); *Lizza v. Town of Hempstead,* 272 App. Div. 921, 71 N.Y.S. 2d 14 (1947); *Burroughs Landscape Co. v. Town of Oyster Bay,* 186 Misc. 123, 16 N.Y.S. 2d 123 (1946). In the earlier *Town of Hempstead* case, *supra,* a zoning law prohibited the taking of soil from land within the town, a suburban residential district, to any place outside the county wherein Hempstead is located. But it permitted soil to be removed from one place to another within the town and county. The court was of the opinion that this ordinance

was invalid as denying equal protection of law. In the second *Hempstead* case, *supra*, and the *Oyster Bay* case, *supra*, the municipalities had ordinances much like that of Mayfield Heights in the principal case. They provided that soil could not be removed below a certain depth, and required drainage provisions and reseeding, plus posting of a performance bond. The courts looked to the residential nature of the towns, along with the additional burden on the drainage system during rains, the dust in dry periods, and the unsightly conditions left by improper soil removal to find the required reasonable relationship between the ordinances and the protection of the common weal. The Supreme Judicial Court of Massachusetts in *Burlington v. Dunn*, 318 Mass. 216, 61 N.E. 2d 243, 168 A.L.R. 1181 (1945), upheld an ordinance which completely prohibited the removal of topsoil in the town of Burlington, a residential district of Boston.

Although the ordinances regulating the removal of topsoil are of relatively recent origin, they are new only as to their subject matter. They do not seem to represent an exertion of a new or arbitrary power by municipalities. The courts in deciding the validity of ordinances controlling topsoil removal take into consideration the effect such removal will have upon the public welfare due to the creation of unsightly areas, reduction of adjoining real estate values and thus a reduction in tax revenues, the effect upon the drainage systems, the danger to health due to standing water, and the possibility of dust storms. If topsoil removal should go uncontrolled these conditions might result in a substantial harm to the welfare of the general public. Where it is found that an ordinance will reduce or prevent these conditions, there seems to be the necessary public interest involved to validate the deprivation of the rights of the landowner and it is reasonable to assume that such an ordinance will be held constitutional.

*Kenneth R. Callahan*

### Personal Property — Alternative Bank Accounts — Right of Survivorship

A married woman deposited fifteen thousand dollars of her own money in a savings and in a checking account, retaining the passbooks herself. In both instances, the bank had contracted to permit either the husband "or" the wife to make withdrawals. Neither account had been drawn upon at the time the husband murdered his wife. An action was brought in the common pleas court by the father and sole heir of the murdered woman to enjoin payment by the bank to the husband from either account. The common pleas court ruled that the husband was entitled to one-half of the balance of these accounts at the time of his wife's death.

On appeal, *held* reversed. The husband has no property rights in these accounts. *Bauman v. Walter,* 160 Ohio St. 273, 116 N.E. 2d 435 (1953).

The account in the principal case was distinguished from that of a joint account and a joint account coupled with a survivorship provision. The obligation of the bank in the present case was to pay the husband *or* the wife; it was not an obligation to pay the husband *and* the wife, as in a joint account. The court stated that the use of the word "or" denoted the intention to establish not joint accounts, but the intention to create rights in the alternative.

In an earlier discussion of bank accounts in the alternative it was stated that these deposits are construed primarily in one of three ways. See Note, 6 OHIO ST. L.J. 191 (1940). The first theory is that the depositor, the original owner of the money, does not intend a transfer of a property interest through the creation of an account, although the other party can withdraw from the account. Thus, if it were admitted that the husband in the principal case had as much right to withdraw from the accounts after the wife's death as he had before, then he could not be enjoined, and the plaintiff's only remedy would be to withdraw the balance before the husband does. But the court indicated that the husband's right was cut off at the death of the wife citing *Smith v. Planters' Savings Bank,* 124 S.C. 100, 117 S.E. 312 (1923), noted in 33 YALE L.J. 93 (1923), which held that the right of the non-contributor to withdraw was only a power of attorney and hence was revoked on the death of the donor. Under this view, the court properly enjoined the defendant from withdrawing the accounts.

The second possible interpretation is that the intent of the depositor is to give to the other party the right of withdrawal upon the death of the depositor, but not to give him such right during the depositor's lifetime. If the transaction under this view is looked upon as an attempt to transfer property as by will, as it was in *Schmitt v. Schmitt* 39 Ohio App. 219, 177 N.E. 418 (1928), it unquestionably fails to comply with the statute of wills. And even if it did not fail in this respect, the husband in the present case could not take under a will because of his murderer's disability. OHIO REV. CODE § 2105.19. If the relationship between the bank and the survivor is viewed, however, as a contract based on a condition precedent of survival, the survivor could properly take under the account. In a case in which the account "to A or to B" it was held that although B had not had the right of withdrawal during A's lifetime, B was entitled to the balance at A's death, because A had established a contract relationship between the bank and B. *Dunn v. Houghton,* 51 Atl. 71, (N.J. Eq. 1902). See Rowley, *Living Testamentary Dispositions,* 3 U. OF CIN. L. REV. 361, 388 (1929). Although incidental survivorship to a joint tenancy does not exist

in Ohio, the same effect may be reached through contract by providing for the right of survivorship to the surviving joint owner. *In Re Estate of Hutchinson,* 120 Ohio St. 542, 166 N.E. 687 (1929). See Martin, *The Incident of Survivorship in Ohio,* 3 OHIO ST. L.J. 48, 59 (1936).

The third possible view is that the depositor intends to create not only a present property interest in the account, but also the right of survivorship. An account of this nature is one which may be stated "to A or B and the balance payable at the death of either to the survivor." In such an instance the intent to create survivorship is readily apparent. *Cleveland Trust Co. v. Scobie,* 114 Ohio St. 241, 151 N.E. 273, (1926). A more difficult situation, however, was encountered in the case of *In Re Estate of Fulk,* 136 Ohio St. 233, 24 N.E. 2d 1020 (1940). There the supreme court allowed parol evidence to clarify an ambiguity as to the intent of creating survivorship in an account stated solely "to A or to B." But in that case a couple married over a period of fifty years had both deposited in the account, and the testimony clearly revealed that the intent of the parties was to create survivorship. To reach the result of survivorship in the *Fulk* case, *supra,* it is obvious that the court had to look beyond the plain meaning of the words to find the intent. It is also noteworthy that in a recent case the supreme court indicated again that the form of deposit is not a conclusive factor in determining ownership in a bank account. *Union Properties, Inc. v. Cleveland Trust Co.,* 152 Ohio St. 430, 89 N.E. 2d 638 (1949). For a more comprehensive treatment of this third position, see Note, 6 OHIO ST. L.J. 191 (1940).

In the preceding paragraph we saw that the contract with the bank in the instant case did not provide a right of survivorship; thus the interest of the wife in these accounts was still intact at her death. The possibility of an *inter vivos* gift was ruled out by the court on the basis that the passbooks had not been delivered, although in an earlier case it was stated that the exclusive possession by the donor of the passbook is not conclusive. *Sage v. Flueck,* 132 Ohio St. 377, 7 N.E. 2d 802 (1937). Here the supreme court might be subject to criticism for failing to distinguish the nature of the two accounts involved. Customarily, a gift of the funds in a checking account is made by writing a check payable to the donee or by withdrawing the funds and giving them to the donee. The possession of the passbook to the checking account would not seem to be a significant indicia of a gift. However, the passbook is normally needed to make withdrawals from a savings account. Another possible theory which the court rejected because of lack of consideration was that of the wife's having passed her interest to her husband through a contract between them. All of the theories herein discussed lead to the conclusion that the wife's

interest had not been extinguished by her death and the husband had acquired no right to the balance of these accounts.

The decision of the court in the instant case is consistent with its previous decisions in recognizing that the controlling factor in determining the legal consequences of a bank account is its express wording, and that only in an extreme case will the court go beyond the plain meaning of the words. The facts of the principal case do not seem to justify going beyond the language of the account, as was done in the *Fulk* case, *supra*. It would appear that there must be cogent reason for imputing any intent beyond that expressly stated in the account; ordinarily if survivorship is desired it is specifically provided.

*Charles R. Leech, Jr.*

PERSONAL PROPERTY — EXEMPT FROM ADMINISTRATION — MURDERER'S DISABILITY TO TAKE

After the defendant was convicted of the murder of his wife, the father and sole heir of decedent joined the administrator and the husband in an action seeking a finding that the husband was not entitled to twenty-five hundred dollars as property exempt from the administration of the estate pursuant to OHIO GEN. CODE § 10509-54. This section provided that if a person died leaving a surviving spouse, such survivor could select certain personal property, or money in lieu thereof, of the deceased to be free from administration as part of the estate. Both the probate court and the court of appeals sustained the defendant's demurrer to plaintiff's petition. On appeal, *held,* OHIO GEN. CODE § 10503-17 precluded the husband from taking the set-off. *Bauman v. Hogue,* 160 Ohio St. 296, 116 N.E. 2d 439 (1953).

Prior to the adoption of OHIO GEN. CODE § 10503-17, the Supreme Court of Ohio had upheld a decision which allowed an only son who had murdered his mother to take from the mother by descent and distribution. *Deem v. Millikin,* 53 Ohio St. 668, 44 N.E. 1134 (1895). The legislature prevented this from occurring again by the enactment of OHIO GEN. CODE § 10503-17 in 1932. The portion of that section applicable here reads:

> "... no person finally adjudged guilty.... of murder.... shall be entitled to inherit or take any part of the real or personal estate of the person killed, whether under this act relating to intestate succession or as devisee or legatee, or otherwise under the will of such person..."

The interpretation of the phrase "....whether under this act relating to intestate succession...." has been the trouble maker.

The lower courts dealt with this statute in *Egelhoff v. Presler,* 32 Ohio Op. 252, 44 Ohio L. Abs. 376 (1945) and *Tyack v. Tipton,*

65 Ohio L. Abs. 397, 105 N.E. 2d 29 (1951). In the *Egelhoff* case, *supra,* a minor was adjudged guilty of the murder of his father. Here, the court interpreted "relating to intestate succession" to mean by descent and distribution. The court said that OHIO GEN. CODE § 10509-54 was obviously not within the purview of the restriction in that it did not appear in the chapter of the code entitled Descent and Distribution.

The court of appeals in the *Tyack* case, *supra,* considered the right of a husband, convicted of the murder of his wife, to take the exemption statute. In reaching a result similar to that in the *Egelhoff* case, *supra,* the court said, "If a stricter rule is desired it must come from the legislature and not from the Courts."

However, the court in the principal case said that a right of intestate succession to a decedent's property is one which depends entirely upon the provisions of the law as distinguished from the provisions of a will. The court put it this way: "The words 'provisions of this act relating to intestate succession'... necessarily include the provisions for a surviving spouse set forth in Section 10509-54, General Code. It is true that the so-called statutes of descent and distribution do relate 'to intestate succession.' It does not follow, as defendant argues, that a statute such as Section 10509-54, General Code, does not relate."

Although a final decision was rendered in the case being noted after the Ohio Revised Code became effective on October 1, 1953, it had reached the courts before the effective date of the revision and was thus decided under the Ohio General Code provision. The words of OHIO GEN. CODE § 10503-17 "... under this act relating to intestate succession..." have been changed by OHIO REV. CODE § 2105.19 to read "... under § 2105.01 to 2105.21, of the revised code..." These sections include only the statutes pertaining to descent and distribution.

Were it not for the change in the wording of the murderer's disability statute by the adoption of the Ohio Revised Code, it would seem that the question of the right of a murderer to take under the exemption statute, new OHIO REV. CODE § 2115.13, would become a settled point on the strength of the supreme court decision in the principal case. Although a supreme court decision had not been rendered on the point at the time of the reenactment, the interpretation of the provision by the lower courts in the *Egelhoff* and *Tyack* cases was fairly clear. Thus it would seem plausible to argue in a future case that the legislature intended to adopt this prior interpretation. The change in the wording of the statute to make it read as it had been interpreted would seem to support this view. On the other hand, the principal case is an authoritative decision as to the meaning of OHIO GEN. CODE § 10503-17 and OHIO REV. CODE § 1.24 says the intent of the legis-

iature was not to change the law as expressed by the Ohio General Code. The firmly grounded policy against murderers benefiting from their crimes along with the principal case as a precedent will undoubtedly bear heavily upon a future court and will possibly prevent the adoption of such a view.

*Kenneth R. Callahan*

TORTS — AUTOMOBILES — IMPUTATION OF CONTRIBUTORY NEGLIGENCE

Plaintiffs permitted their son, under 18 years old, to drive their automobile. The Delaware Statute, 21 DEL. REV. CODE § 6106 (1935), reads "Every owner of a motor vehicle who ... knowingly permits a minor under ... 18 to drive such vehicle ... shall be jointly and severally liable with such minor for any damage caused by the negligence of such minor in driving such vehicle." As a result of the concurring negligence of the defendant and the plaintiff's son, the plaintiffs' car was wrecked; plaintiffs sued to recover for property damage. Defendant contended that the son's contributory negligence is imputed to the plaintiffs thus barring recovery under 21 DEL. REV. CODE § 6106. Plaintiffs moved to strike this defense. *Held,* motion granted. The court felt that the imputation of a minor's negligence to an owner under this statute is applicable only in actions brought by a third person against the owner. *Westergren v. King,* 99 A. 2d 356 (Sup. Ct. of Del. 1953).

At common law, the owner-bailor of an automobile was not liable for the negligence of another whom he permitted to drive, *Williamson v. Eclipse Motor Lines,* 145 Ohio St. 467, 62 N.E. 2d 239, 168 A.L.R. 1356 (1945); *McElrath v. Luardo,* 33 Ohio L. Abs. 279, 19 Ohio Op. 460 (1939); *Edwards v. Benedict,* 79 Ohio App. 134, 70 N.E. 2d 471, (1946); see *Grant v. Knepper,* 245 N.Y. 158, 156 N.E. 650, 54 A.L.R. 845 (1927); see *Priestly v. Skourap,* 142 Kan. 127, 45 P. 2d 451 (1935); Note, 100 A.L.R. 916 (1936); Note, 36 A.L.R. 1128 (1925); see CYCLOPEDIA OF AUTO LAW AND PRACTICE §§ 2865 and 2911. Therefore, the owner could recover from negligent third persons although the driver was also negligent. *Victor Tea Co. v. Walsh,* 9 Ohio L. Abs. 298, 176 N.E. 585 (1931); *Readnour v. Cincinnati Street Railway Co.,* 79 Ohio App. 345, 71 N.E. 2d 533 (1946); *Curle v. Tyfe,* — Ohio App. —, 105 N.E. 2d 428 (1951); *contra, Rose v. Baker* 139 Tex. 554, 160 S.W. 2d 515 (1942). However, if the negligent driver were the owner's agent or servant, *Denison v. McNorton,* 228 Fed. 401, 142 C.C.A. 631 (1916), or if the owner knew the driver was incompetent, the owner would be liable to an injured third party for the damage caused by the driver, *Elliott v. Harding,* 107 Ohio St. 501, 104 N.E. 338 (1923); *Cunningham v. Bell,* 149 Ohio St. 103, 77 N.E. 2d 918 (1948), and

also the owner would be barred from recovering from the negligent third person. See *Elliott v. Harding, supra.; Cunningham v. Bell, supra.*

The trend is to modify this common law rule in order to assure relief for injured parties against financially irresponsible drivers who are neither agents nor servants of the owner. See CYCLOPEDIA OF AUTO LAW AND PRACTICE § 2912; RESTATEMENT, TORTS, § 485 (b). The family purpose doctrine, which allows the injured third party to recover from the head of the household for the negligent driving of his family, has been one device to insure financial responsibility. *Canning v. Cunningham,* 322 Mich. 182, 33 N.W. 2d 752, (1948). Some states still follow this doctrine. See Note, 36 A.L.R. 1141; 9 GA. B.J. 98 (1946); 10 GA. B.J. 222 (1947); 20 TENN. L. REV. 376 (1948); 1 KAN. L. REV. 368 (1953); CYCLOPEDIA OF AUTO LAW AND PRACTICE, §§ 3091 and 3111. Ohio does not follow the family purpose doctrine. *Elms v. Flick,* 100 Ohio St. 186, 126 N.E. 66 (1919); *Bretzfelder v. Demaree,* 102 Ohio St. 105, 130 N.E. 505 (1921).

Many states have passed statutes to insure financial responsibility for irresponsible drivers. See Comment, 45 *Harv. L. Rev.* 171 (1931). (1) Some states declare the owner liable for the negligence of *any driver* whom he knowingly permits to drive. McKinney's N.Y. VEH. & TRAF. LAW § 59; MINN. STAT. ANN. § 170.54, R.I. GEN. LAWS c. 1429, § 10. (1929). (2) Others say any owner who knowingly permits a *minor below a certain age* to drive shall be liable for any damage caused by the minor's negligence. 21 DEL. REV. CODE § 6106 (1935) (age 18); IOWA CODE § 5026 (1927) (age 15); KAN. GEN. CODE § 8-222 (1949) (age 16). (3) Still other statutes require a parent or guardian to sign a minor's application for an operator's license when the minor is below a certain age and provide that any negligence of the minor will be imputed to the person who signed. OHIO REV. CODE § 4507.07 (6296-10b) (age 18); WIS. STAT. §§ 85.089 and 85.0810 (age 18); CAL. VEH. CODE §§ 350 and 352 (age 21).

It is well established that the import of these statutes is to make the owner liable when sued by the injured third person. See Note, 135 A.L.R. 481 (1941); Note, 61 A.L.R. 884 (1929); Note, 112 A.L.R. 427 (1938); CYCLOPEDIA OF AUTO LAW AND PRACTICE, § 3092.

However, when there is concurring negligence between the third person and the driver of the owner or parent's car and when the owner or parent subsequently sues the third person, a new problem arises which apparently was not foreseen by most legislatures. The question is this: Does the language employed in the statute not only make the owner liable to third persons for the driver's negligence, but also preclude the owner from recovering against negligent third persons when the driver has been guilty

of contributory negligence? There seem to be two conflicting views. One view interprets the statute narrowly and allows recovery as did the principal case. *Webber v. Graves,* 234 App. Div. 579, 255 N.Y.S. 726 (1932); *Mills v. Gabriel,* 259 App. Div. 60, 18 N.Y.S. 2d 78, *affirmed,* 284 N.Y. 755, 31 N.E. 2d 512 (1940); *Kernan v. Webb,* 50 R.I. 394, 148 Atl. 186; *Pancoast v. Co-operative Cab. Co.,* 37 So. 2d 452 (App. La. 1948); *Jacobson v. Dailey,* 288 Minn. 201, 36 N.W. 2d 711, 11 A.L.R. 2d 1429, 1437 (1949). There are several reasons given for this view: The legislature only intended to protect the public by assuring financial responsibility for irresponsible drivers; the legislature intended to make owners or parents mere insurers and not principals of the drivers; statutes in derogation of common law should be strictly construed.

The other view interprets the statute broadly and bars the owner or parent from recovery. *Milgate v. Wraith,* 19 Cal. 2d 297, 121 P. 2d 10 (1942); *Fox v. Schuster,* 50 Cal. App. 2d 362, 123 P. 2d 56 (1942); *National Trucking and Storage Co. v. Driscoll,* 64 A. 2d 304 (Mun. Ct., D.C. 1949); *Secure Finance Co. v. Chicago, R.I. & Pac. Ry.,* 207 Iowa 1105, 224 N.W. 88, 61 A.L.R. 885 (1929); *Kirk v. United Public Gas Service,* 165 So. 735 allowed recovery, *reversed,* 185 La. 580, 170 So. 1 (1936); *DiLeo v. Montier,* 195 So. 74 (1940); *Scheibe v. Town of Lincoln,* 233 Wis. 425, 271 N.W. 47 (1937) (comparative negligence doctrine); *Flaggs v. Johansen,* 124 N.J.L. 456, 12 Atl. 2d 374 (1940). These courts base this view on these reasons: It was the legislative intent to make the owner or parent responsible for *all* negligence of the driver; that a principal-agency relationship was created; that if the negligence of the operator is imputable to the owner in actions by third parties against owners, the converse must be true, that is, the negligence of the operator will be imputable to the owner in actions by the owner against third parties.

There seems to be no Ohio case in point. However, it is to be noted that the language of OHIO REV. CODE § 4507.07 (6296-10b) seems broad enough to impute all negligence, including contributory negligence, to the signer of a minor's application. The statute reads "Any negligence ... of a minor under 18 ... when driving a motor vehicle upon a highway shall be imputed to the person who signed the application ..., which person shall be jointly and severally liable with such minor for any damage caused by such negligence ...." On the other hand, when this provision is read in context with all of OHIO REV. CODE § 4507 (6296-10) whose third paragraph provides for a method of releasing the signer of the application from his burden if proof of the minor's financial responsibility is filed with the Registrar of Motor Vehicles, the legislative intent seems merely to insure financial responsibility and not to

create a principal-agency relationship between minor and signer by which contributory negligence will be imputed to bar the signer's recovery against a negligent third party. California and Wisconsin, with statutory provisions very similar to Ohio's, bar recovery. *Fox v. Schuster, supra; Milgate v. Wraith, supra; Scheibe v. Town of Lincoln, supra.*

While not affecting the instant suit, yet interesting to note, the Delaware Legislature subsequent to its instigation, added these words to 21 DEL. REV. CODE § 6106 "and the negligence of such minor shall be imputed to such owner for *all* purposes of civil damages" (italics added), thus probably barring the owner's recovery against negligent third persons if the question arises in the future in Delaware.

*Thor G. Ronemus*

STATE TAXATION — INTANGIBLE PERSONAL PROPERTY — SITUS OF ACCOUNTS RECEIVABLE

Taxpayer, a resident Ohio corporation, owned accounts receivable which arose out of business transacted outside of Ohio but which were not used in business outside of Ohio. These receivables were not returned by the taxpayer for Ohio intangible personal property tax, and the Tax Commissioner of Ohio made a deficiency assessment. On appeal to the Ohio Board of Tax Appeals, the order of the Commissioner was affirmed with one member dissenting. *Held,* reversed. Rule 224, as amended in 1953, which subjected accounts receivable of domestic corporations arising from business transacted outside of the state to intangible property tax unless also used in business transacted outside the state, was in conflict with the prior interpretation of Ohio's taxation statute. Thus, the rule is invalid as to the requirement that such accounts receivable must be used in business transacted outside the state to be exempt from the Ohio tax. *The Hoover Co. v. Peck,* 160 Ohio St. 64, 113 N.E. 2d 85 (1953).

The basic principle that a state may tax only property within its jurisdiction, *Union Refrigerator Transit Co. v. Kentucky,* 199 U. S. 194 (1905); *Frick v. Pennsylvania,* 268 U. S. 473 (1925), has led to this general rule in determining the tax situs of intangible personal property: Intangible personal property has a tax situs at the owner's domicile. *Union Refrigerator Transit Co. v. Kentucky, supra; Blodgett v. Silberman,* 277 U. S. 1 (1928); *Wheeling Steel Corporation v. Fox,* 298 U. S. 193 (1936). This general rule has been stated in the maxim *"mobilia sequuntur personam." Blodgett v. Silberman ,supra.* Also this rule has been well reasoned on the ground that a citizen has a duty at the place of his domicile

to contribute to the support of the state government in return for the benefits of property protection and enjoyment. *Curry v. McCanless,* 307 U. S. 357 (1939). With the growth of business activities, the "business" or "commercial situs" rule emerged so that intangible personal property may acquire a business situs at a place other than at the owner's domicile when such intangibles becomes integral parts of some local business. *Wheeling Steel Corporation v. Fox, supra; Kelly Springfield Co. v. Tax Commission,* 38 Ohio App. 109, 175 N.E. 700 (1931); *Newark Fire Insurance Co. v. State Board of Tax Appeals,* 307 U. S. 313 (1939); Note, 143 A.L.R. 361 (1943).

Since the domiciliary state, *Curry v. McCanless, supra,* and the state in which the accounts receivable have acquired a business situs, *Wheeling Steel Corp. v. Fox, supra,* may have concurring jurisdiction to tax the same accounts receivable, double taxation is quite possible. See Am. Jur., Taxation § 467; 104 A.L.R. 806 (1936); 79 A.L.R. 344 (1932); 76 A.L.R. 806 (1932). Although several United States Supreme Court decisions have held that there is no constitutional provision prohibiting double taxation, *Curry v. McCanless, supra; First Bank Stock Corp. v. Minnesota,* 301 U. S. 234 (1937); *Tax Commission v. Aldrich,* 316 U. S. 174 (1942), Ohio has adopted statutory provisions [OHIO REV. CODE §§ 5709.02 (5328-1), 5709.03 (5328-2), 5701.08 (5325-1)] with the intention of avoiding this double taxation. Glander and Dewey, *Taxation of Accounts Receivable in Ohio — The Impact of Constitutional Limitations,* 11 OHIO ST. L. J. 173 (1950).

The following are the Ohio statutes pertaining to the situs of accounts receivable used in business:

> "... Property of the kinds and classes mentioned in Section 5709.03 (5328-2) of the Rev. Code, *used in* and *arising out of business transacted in this state,* by, for or on behalf of a non-resident ... shall be subject to taxation; and all such property of persons residing in this state *used in* and *arising out of business transacted outside of this state* by, for or on behalf of such persons ... shall not be subject to taxation ...." OHIO REV. CODE 5709.02 (5328-1) (Italics added).
>
> "Property of the kinds and classes herein mentioned, when used in business, shall be considered to arise out of business transacted in a state other than that in which the owner thereof resides in the cases and under the circumstances following:
>
> > "In the case of accounts receivable, when resulting from the *sale of property sold by an agent having an office in such other state or from services performed by an officer, agent or employee* connected with, sent from or reporting to any officer

> or at any office located in such other state....
>
> *"The provisions of this section shall be reciprocally applied,* to the end that all property of the kinds and classes mentioned in this section having a business situs in this state shall be taxed herein and no property of such kinds and classes belonging to a person residing in this state and having a business situs outside of this state shall be taxed .... OHIO REV. CODE 5709.03 (5328-2) (Italics added).
>
> "... Money, deposits, investments, *accounts receivable* and prepaid debts, and other taxable intangibles *shall be considered to be* "Used" when they... are *applied... in the conduct of the business, whether in this state or elsewhere...*" OHIO REV. CODE 5701.08 (5325-1) (Italics added).

These statutes were initially interpreted in the case of *Ransom and Randolph v. Evatt,* 142 Ohio St. 398, 52 N.E. 2d 738 (1944) in which the Supreme Court of Ohio decided that accounts receivable of an Ohio corporation, to be exempt from the Ohio intangible personal property tax, should arise from business transacted outside of Ohio [as described in OHIO REV. CODE § 5709.03 (5328-2)] and should be used in the general business of the corporation, whether in Ohio or elsewhere [within the purview of OHIO REV. CODE § 5701.08 (5325-1)]. The effect of this *Ransom and Randolph* decision was that, for domestic corporations, the sole test for determining the tax situs of accounts receivable used in business was whether the accounts receivable arose out of business transacted in the non-resident state.

Because of the reciprocal situs provision of OHIO REV. CODE §5709.02 (5328-2), the Tax Commissioner applied the ruling of the *Ransom and Randolph* case to foreign, nonresident businesses as well as to domestic, resident businesses. However, the United States Supreme Court, in *Wheeling Steel Corporation and National Distillers Products v. Glander,* 337 U.S. 562 (1948) *reversing* 150 Ohio St. 229, 80 N.E. 2d 863 (1948), held that the application of the single test rule of the *Ransom and Randolph* case to the receivables of foreign corporations denied equal protection of the law to the foreign corporations, since circumstances could be presented where the accounts receivable of a domestic corporation would be exempt from Ohio taxation while the accounts receivable of the foreign corporation would be taxed. See Comment, 18 U. OF CIN. L. REV. 496 (1949).

In June, 1950, the Tax Commissioner promulgated Rule 224 to obviate the constitutional defect which the United States Supreme Court found in the situs statute as interpreted in the *Ransom and Randolph* case. The rule required that for accounts re-

ceivable to have a business situs in a non-resident state, they must arise out of business transacted in the non-resident state and also must be used in business outside of the non-resident state, "used in business" meaning "subject to the control and management of an agent or officer of the owner at an office in a state other than that in which the owner thereof resides." The effect of this rule was to require a dual business situs test for both domestic corporations (to decide if they were exempt from Ohio tax) and foreign corporations (to decide if they were subject to Ohio tax).

Thus, the stage was set for the instant case of *The Hoover Co. v. Peck, supra,* involving a domestic corporation whose accounts receivable arose from business transacted outside of Ohio but which were not used in business outside of Ohio. As we saw previously, the Supreme Court of Ohio followed the single test of the *Ransom and Randolph* case, reasoning that the *Wheeling Steel Corporation* case applied only to foreign corporations as distinguished from domestic corporations and that the legislature must have acquiesced in the *Ransom and Randolph* decision since the statutes were not subsequently amended. The effect of the instant case was to disregard the reciprocity provision of OHIO REV. CODE §5709.03 (5328-2).

After the instant case, Rule 224 was amended so that today the Ohio rule for determining the tax situs of accounts receivable used in business is as follows: (1) *For resident businesses* — From where do the accounts receivable arise, as determined by the three tests of OHIO REV. CODE §5709.03 (5328-2)? If they arise from business transacted outside of Ohio, they are exempt from Ohio tax even though they are controlled and managed in Ohio. (2) *For non-resident businesses* — From where do the accounts receivable arise, as determined by the three tests of OHIO REV. CODE § 5709.03 (5428-2) and at what office are the accounts receivable controlled and managed? If they arise from business transacted in Ohio, they are still exempt unless they are also managed and controlled in Ohio.

As a result of the present situation, Ohio is not receiving all the taxes from intangible personal property to which it is constitutionally entitled, since resident businesses escape the Ohio tax by merely having their accounts receivable arise in another state. It is submitted that the only way to correct this defect is to amend OHIO REV. CODE §5709.03 (5328-2) so that it is unequivocally indicated that the legislature intends to apply a dual test for both resident and non-resident businesses. In this manner, the original intention of preventing double taxation within Ohio will be carried out concomitant with Ohio's receiving its fair share of revenue from the tax on accounts receivable.

*Thor G. Ronemus*

STATE TAXATION — REAL PROPERTY
PARTIAL EXEMPTION

OHIO REV. CODE §5709.07 (5349) provides that "houses exclusively used for public worship shall be exempt from taxation." The board of tax appeals denied the application of the taxpayer church for exemption from ad valorem taxation of a two story building, the first floor of which contained the church auditorium and the second floor of which had two suites of rooms, one of which is occupied by the janitor and his family, and the other by the church minister and his family. The Board's opinion was predicated upon its finding that there was no evidence that it was necessary for the pastor and his family to reside in the said building. Split listing was denied under OHIO REV. CODE §5713.04 (5560) because more than fifty percent of the building was used for private residential purposes. On appeal to the Supreme Court of Ohio, *held,* reversed, (4-3), the first floor being used exclusively for tax exempt purposes could be set off, not on a percentage basis, but by a split valuation of the separate entities of the building for tax purposes. *Church of God of Cleveland v. Board of Tax Appeals,* 159 Ohio St. 517, 112 N.E. 2d 633 (1953). The dissent maintained that the plain meaning of the statutory language "exclusively" must be strictly construed.

The Supreme Court of Ohio in its first interpretation of Article XII, Section 2 of the Ohio Constitution and OHIO REV. CODE §5709.07 (5349) held that to be exempt the building must be used *exclusively* for public worship. *Gerke v. Purcell,* 25 Ohio St. 229 (1874). The residence of the pastor was attached to the church. Then, in 1945 the problem of partial exemption was squarely presented to the Supreme Court of Ohio with the argument that a building should be physically split for tax purposes. *Welfare Federation v. Glander,* 146 Ohio St. 146, 64 N.E. 2d 813 (1945). Though the taxpayer involved was a charitable institution the court rejected "partial exemption" and interpreted the words "used exclusively" as contained in the constitution and statute to mean the whole property must be used for tax exempt purposes. This decision affirmed a former strict construction that the use "exclusively" does not mean "in part." *Pfeiffer v. Jenkins,* 141 Ohio St. 66, 46 N.E. 2d 767 (1943). Therefore, the strict view toward partial exemption by split listing, applied whether the housing of the personnel is physically attached to the church (vertical split) or is located on a floor above the church (horizontal split). *Watterson v. Holiday,* 77 Ohio St. 150, 82 N.E. 962 (1907); *Massio v. Glander,* 149 Ohio St. 433, 79 N.E. 2d 233, 15 A.L.R. 2d 1064 (1948). In *Massio v. Glander, supra,* there was involved a three story building, the first floor being occupied as a chapel and the upper two floors were used for non-exempt

purposes. Later, the court relented from the very narrow construction it had placed upon the words "used exclusively" and held, that if the non-exempt use was incidental and necessary to the main purpose the whole building would be exempt. *In Re Bond Hill Roselaw Hebrew School,* 151 Ohio St. 70, 84 N.E. 2d 270 (1949). The exemption involving a one-and-one half story building was allowed though the caretaker was permitted to live rent free with his family in rooms above the church. Though there seems to be no factual distinction between the *In re Bond Hill Roselaw Hebrew School, supra,* and the previous *Gerke, Watterson,* and *Massio* cases, *supra,* the court attempted to distinguish these prior cases on the basis that parsonages and parish houses are used primarily as places of residence while the building in the instant case was devoted primarily to public worship. But the court expressly denied percentage splitting which was the theory upon which the tax board in the instant case had based its decision. In October of 1949, OHIO REV. CODE §5713.04 (5560) was amended to authorize the split listing of a single parcel of real estate having single ownership if it contained a "separate entity" used exclusively for tax exempt purposes. A short time later this statute was construed and it was held that one floor of a building is not a separate entity. *Goldman v. L. B. Harrison,* 158 Ohio St. 181, 107 N.E. 2d 530 (1952). *The Goldman Case, supra,* merely stated that OHIO REV. CODE §5713.04 (5560) was not applicable and decided the case on the basis that the one exempt use was not incidental to the exempt purpose. The dissent in the principal case thought the *Harrison* view should be controlling, and that a single building used for both religious and non-religious purposes does not answer the description of OHIO REV. CODE §5713.04 (5560). The recent case of *Welfare Federation v. Peck,* 160 Ohio St. 509, 117 N.E. 2d 1 (1954) approved split listing and further affirmed the principal case, though the dissent retained their position that a strict construction of the Ohio Constitution would not permit split listing of a building having a single ownership.

The principal case allows an exemption to the first floor even though the second floor is used for non-exempt purposes. (horizontal splitting). This construction would impliedly include vertical splitting since it is more easily adopted to precise quantative separation. The principal case also squarely presents the problem: What is a separate entity? A separate entity has been defined as composed of two elements, namely, independent use and capable of separate ownership. *Cincinnati College v. Yeatman,* 30 Ohio St. 276 (1876). Logically, it should make no difference, therefore, whether the split is horizontal or vertical since they are both capable of independent use and separate ownership. This would

theoretically extend to one room in the Empire State Building.

The majority view in the principal case allows the church exemption of the area used for worship and yet it does not place the taxpayer at an undue disadvantage since the church pays taxes on the remainder of its property. The court adopted a liberal view which eliminates the problems and injustices of the "incidental approach." The decision indicates an extension of the power of the legislature to exempt property, which in the interest of sound tax administration this extension should be expressly stated in the constitution.

*William F. Newman*

WORKMEN'S COMPENSATION — THE NECESSARY ELEMENT FOR EMPLOYER-EMPLOYEE RELATIONSHIP

Petitioner, a farmer, was injured while operating his own corn picker on the farm of a neighbor. No compensation was to be received for the work as the petitioner was returning work voluntarily done for him by the neighbor. The only communication between the farmers occurred when the owner of the farm gave the petitioner instructions as to the cutting. The Industrial Commission of Wisconsin ruled that the petitioner was an employee of the farm owner and awarded compensation for the injury. In affirming on appeal, the Supreme Court of Wisconsin held that an implied contract of hire arose through the custom of the community to repay one for labor performed and that the right to control was manifested when the farm owner told the petitioner how to do the cutting. This was sufficient under the Workmen's Compensation Act to warrant the finding of an employer-employee relationship. *Gant v. Industrial Commission,* 263 Wis. 64, 56 N.W. 2d 525 (1953).

The common law required four elements to sustain a finding of a master-servant relationship. These were:

1) selection and engagement of the servant;
2) payment of wages;
3) power of dismissal;
4) power of the control of the servant's conduct.

*Carman v. The Steubenville and Indiana Railroad Co.,* 4 Ohio St. 399 (1854); 35 AM. JUR., Master and Servant, § 2; *Atlantic Coast Line R. Co. v. Tredway,* 120 Va. 735, 93 S. E. 560 (1917). State legislatures, in providing for Workmen's Compensation benefits, created a system to charge personal injuries to business costs and eliminate the waste, inequities and the harassment of both employers and employees involved in the common law method of compensation. 42 O. Jur., Workmen's Compensation §1. The acts now require only a showing of a contract of hire, express or implied, in

place of all four common law elements to constitute an employer-employee relationship. OHIO REV. CODE §4123.01 (1953); WIS. STAT.; 102.07-4; *Drexler v. Labay,* 155 Ohio St. 244, 98 N.E. 2d 410 (1951); *Case v. Industrial Commission,* 231 Wis. 133, 285 N.W. 539 (1939). Therefore, the major test today is the right to control the details of the work performed, whether such right is exercised or not. *Firestone v. Industrial Commission,* 144 Ohio St. 398, 59 N.E. 2d 147 (1945); *Gillum v. Industrial Commission,* 141 Ohio St. 373, 48 N.E. 2d 234 (1943); *State v. Whims,* 68 Ohio App. 39, 39 N.E. 2d 596 (1941); *Home v. Industrial Commission,* 248 Wis. 5, 20 N.W. 2d 573 (1945); *Ebner v. Industrial Commission,* 252 Wis. 199, 31 N.W. 2d 172 (1948). The retention of the "right to control" test allows an employer to prescribe the manner of doing the work and to be responsible for the methods used by the employee.

It is possible to refute the alleged existence of an employer-employee relationship by a showing that such service performed was either (1) that of an independent contractor, or (2) casual. Workmen's Compensation benefits have not been extended to this area in which an employer's responsibility would be greater than his power to control the employee and protect himself.

The existence of an independent contractor relationship is tested by determining if a person has the right to control the work of another. If the control is delegated or left to the person doing the work and he is responsible to the employer only for the result, then the relationship is that of an independent contractor. *Phaneof v. Industrial Commission,* 263 Wis. 376, 57 N.W. 2d 408 (1953); *Behner v. Industrial Commission,* 154 Ohio St. 433, 96 N.E. 2d 403 (1951); *Bobik v. Industrial Commission,* 146 Ohio St. 187, 64 N.E. 2d 829 (1946); *Industrial Commission v. Laird,* 126 Ohio St. 617, 186 N.E. 718 (1933); *Clifton v. Industrial Commission,* 52 Ohio L. Abs. 144, 82 N.E. 2d 754 (1945); *Marrie v. Industrial Commission,* 37 Ohio Op. 384, 81 N.E. 2d 300 (1947). The absence of the right to control the worker is imperative for an independent contractor relationship. *Bobik v. Industrial Commission, supra.*

The test for casual employment is not the duration of services, but whether or not the services were performed in a connection other than the trade or business of the employer. *Schneeberg v. Industrial Commission,* 67 Ohio App. 499, 37 N.E. 2d 427 (1941). As long as a person works in the "usual course of the trade, business, profession, or occupation of the employer" regular employment exists. *Bettman v. Christen,* 128 Ohio St. 56, 190 N.E. 233 (1934); *State v. Sword,* 43 Ohio L. Abs. 345, 62 N.E. 2d 506 (1945); *Smith v. Brockamp,* 81 Ohio App. 381, 77 N.E. 2d 727 (1947). But the majority of cases hold that employment which is for a limited or temporary purpose lasting but a few days or weeks is casual.

For a collection of cases see 58 AM. JUR., Workmen's Compensation, §94; *Re Cagnor,* 217 Mass. 86, 104 N.E. 339 (1914); 107 A.L.R. 941 (1937); *Van Nuyes v. Levine,* 11 N.J. Misc. 309, 165 Atl. 885, 33 A.L.R. 1464, 1465 (1932); *Chicago G.W., R.R. v. Industrial Commission,* 284 Ill. 573, 120 N.W. 508 (1913).

The court in the principal case relied upon *Northern Trust Co. v. Industrial Commission, supra,* to establish the implied contract. In that case, two farmer employers had often exchanged labor without any money payments, except for machinery loaned. The borrowing farmer was held to be the employer of the workers loaned from the other farmer-employee. But a more recent case has required that a consensual relationship exist between the employee and the borrower in order to create a new employer-employee relationship, and that such a relationship cannot be created by the command of the original employer. *Boehck Equipment Co. v. Industrial Commission,* 246 Wis. 178, 16 N.W. 2d 298 (1944); *Combustion Engineering Co., Raymond Pulverizer Division v. Industrial Commission,* 254 Wis. 167, 35 N.W. 2d 317 (1948). It appears that such "consensual relationship" is lacking in the principal case, since the exchange of work occurred but once under no legal obligation, and no agreement to exchange work on such a basis was evident. *Bituminous Casualty Co. v. Industrial Commission,* 245 Wis. 337, 13 N.W. 2d 923 (1944).

To imply a contract relationship, Wisconsin requires that a person accept services from another which are valuable to him. *In re St. Germain's Estate,* 246 Wis. 409, 17 N.W. 2d 582 (1945). But Ohio appears to be more strict, and has held that an implied contract was not created where a person merely performed services with the expectation of receiving compensation. *Tanski v. White,* 92 Ohio App. 411, 109 N.E. 2d 319 (1952). Thus, Ohio courts may well follow Wisconsin in recognizing an employer-employee relationship where employers exchange workers quite often or where services are rendered under a legal obligation in which some form of compensation must be returned. But is is doubtful if Ohio courts will go the step further to create an implied contract and such a relationship where labor is exchanged under a community custom, not subject to legal enforcement. While such an act may not be classified as that of an independent contractor, the belief is expressed that work on an exchange for one time only as in the principal case could be termed a "casual" relationship.

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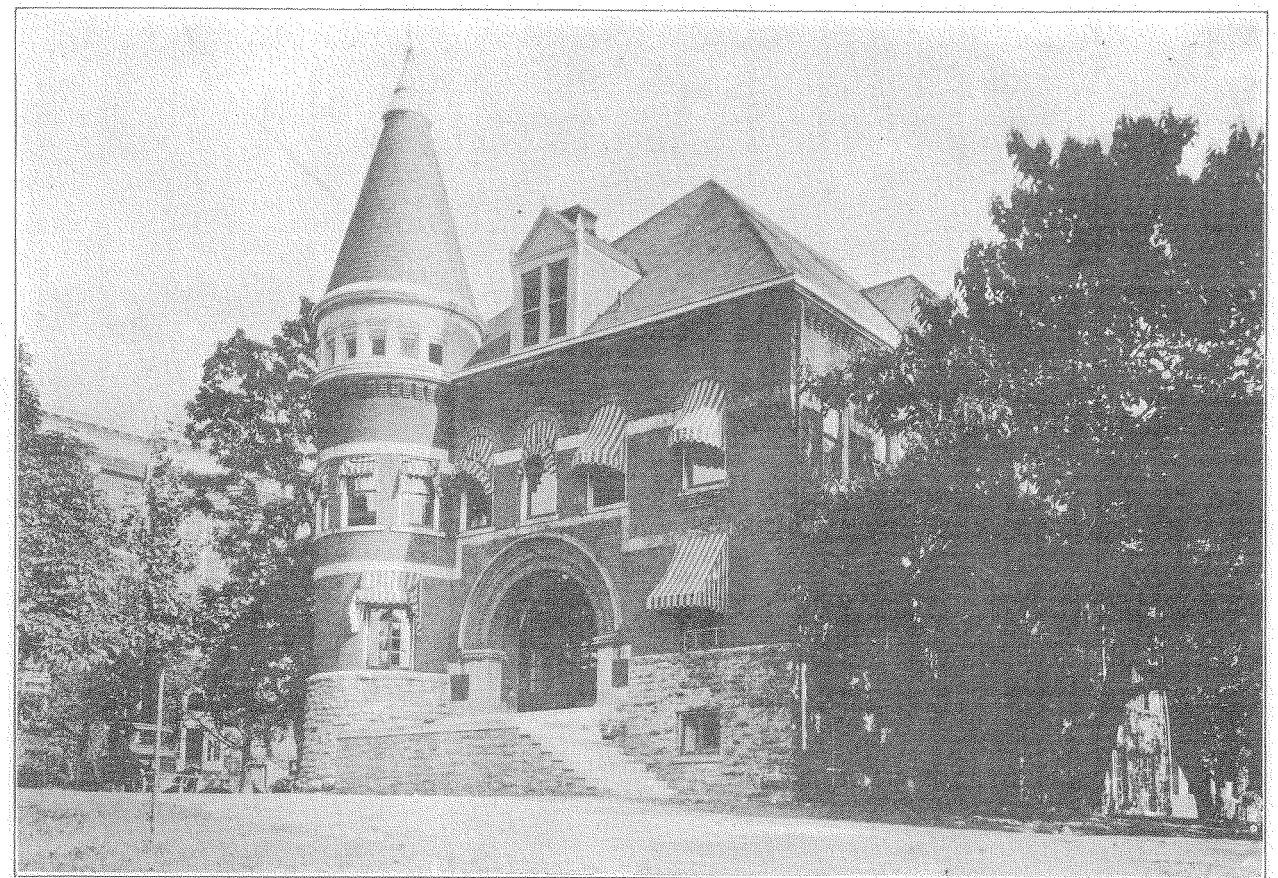

THE LAW BUILDING