Recent Decisions

CONSTITUTIONAL LAW — NONCONFORMING USES — VESTED RIGHT

In 1922, the city of Akron enacted a comprehensive zoning ordinance, which *inter alia* placed within a residential zone property on which defendant had since 1916 continuously operated a junk yard. The ordinance provided that existing nonconforming uses could remain until the city council had in its discretion determined that such uses had been permitted to exist for a reasonable time. In January, 1950, Council determined that as of January 1, 1951, defendant's nonconforming use was to be discontinued because it would then have existed for a reasonable time. The defendant having continued the use beyond said date, the city brought an injunctive action. The trial court denied relief but the court of appeals reversed and entered judgment for the city. On further appeal to the Ohio Supreme Court, *held,* reversed. The right to continue to use one's property in a lawful business, if not a nuisance and not unlawful when the business was established, is within the protection of Section 1, Amendment XIV, U.S. Constitution and Section 16, Article I, Ohio Constitution. *City of Akron v. Chapman,* 160 Ohio St. 382, 116 N.E. 2d 697 (1953).

The principle that comprehensive zoning laws have a prospective aspect has been recognized as a proper exercise of the police power. *Village of Euclid v. Ambler,* 272 U.S. 365 (1926); *Pritz v. Messer,* 112 Ohio St. 628, 149 N.E. 30 (1925); *Youngstown v. Kahn,* 112 Ohio St. 654, 148 N.E. 842 (1925). The principle is subject in the individual case to the requirement that the power be exercised reasonably and bear a rational relation to the public health, safety, morals and general welfare. *Nectow v. Cambridge,* 277 U.S. 183 (1928). Whether such provisions can by retroactive effect operate against uses in existence when the ordinance was passed is a question which is in great conflict in the states, and which the Supreme Court of the United States on two occasions has declined to answer. *Louisiana* ex rel. *Dema Realty Co. v. McDonald,* 280 U.S. 556 (*cert. denied,* 1929). *Marblehead Land Co. v. Los Angeles,* 284 U.S. 634 (cert. denied, 1931).

Two decisions, illustrating one state's view, sustained the validity of a New Orleans zoning ordinance which required nonconforming uses to terminate in one year; however, they did not completely repudiate the nuisance theory of an earlier case. *State* ex rel. *Dema Realty Co. v. Jacoby,* 168 La. 752, 123 So. 314 (1929); *State* ex rel. *Dema Realty Co. v. McDonald,* 168 La. 172, 121 So. 615 (1929).

The more accepted view and probably the majority rule is

that an existing use creates an individual property right and that a government cannot take such property by exercising its police power. *Jones v. Los Angeles,* 211 Cal. 304, 295 Pac. 14 (1932). In *O'Connor v. City of Moscow,* 69 Idaho 37, 202 P. 2d 401, 9 A.L.R. 2d 1031 (1949), the court held that a change of ownership did not affect the new owner's right to continue an existing nonconforming business. The principal case places Ohio with the majority as to the protection given an existing nonconforming use. The Supreme Court of Ohio held that such a use creates a vested property right constitutionally protected. This decision makes decisive an earlier appellate decision which held that a zoning law cannot operate retrospectively to prevent an owner from exercising his full rights in the use of his property. *Reilly v. Conti,* 93 Ohio App. 188, 112 N.E. 2d 558 (1952), Appeal dismissed, 158 Ohio St. 232, 108 N.E. 2d 281 (1952).

All courts have recognized that when the existing use comes within the category of a common law nuisance it may be eliminated. *Manos v. Seattle,* 173 Wash. 662, 667, 24 P. 2d 91, 92 (1937); *Jones v. Los Angeles, supra.* Uses which will be deemed a nuisance will vary, but cases indicate that a more liberal attitude exists than at common law. *Hadacheck v. Sebastian,* 239 U.S. 394 (1915). Also, the liberalized concept of public use makes eminent domain a feasible way to eliminate nonconforming uses in cases not within the nuisance category and where the rule of the *Jones* case is followed. *State* ex rel. *Bruestle v. Rich,* 159 Ohio St. 13, 110 N.E. 2d 772 (1953).

The *Jones* rule has been indirectly limited by finding that the use in question was not an existing use. The minority rule that a valid permit constitutes an existing use finds expression in *Ware v. Wichita,* 113 Kan. 153, 214 Pac. 99 (1923). The majority view requires a valid permit and substanntial construction or liabilities in reliance on the permit. *Brett v. Bldg. Comm'r. of Brookline,* 250 Mass. 73, 145 N.E. 269 (1924). Where the use has existed in violation of a valid zoning law or contra to a restrictive convenant in a deed no rights are created to justify continuance. *Wilkins v. San Bernardino,* 162 P. 2d 711 (Cal. 1945); *Aff'd.* 29 Cal. 2d 332, 175 P. 2d 542 (1946). *Larson v. Howland,* 279 App. Div. 650, 108 N.Y.S. 2d 231 (1951).

The Ohio courts which have considered what constitutes a vested right indicate that a valid permit plus substantial construction in reliance on the permit create such a right. *Williams v. Deer Park,* 78 Ohio App. 231, 47 Ohio Op. 11 (1946). *Behm v. Wolfert,* 2 Ohio L. Abs. 647 (1924) motion to certify dismissed, 111 Ohio St. 830 (1924). *Santangelo v. City of Cincinnnati,* 25 Ohio N.P. (N.S.) 49 (Super. Ct. of Cincinnnati, 1924). This rule

is consistent with the majority rule of substantial construction expressed in *Brett v. Bldg. Comm'r., supra.* The Ohio courts have consistently held that the issuance of a valid permit does not create a vested property right and that the permit may be revoked without violating any constitutionally protected rights. *Reilly v. Conti, supra; Williams v. Guion,* 27 Ohio App. 141, 5 Ohio L. Abs. 696 (1927); See *State v. Rendigs,* 98 Ohio St. 251, 120 N.E. 836 (1918). However, where a subsequently enacted zoning law has excepted the holders of validly issued building permits from the requirements of the law, it has been held that the nonconforming construction must be allowed. *Hauser v. State,* 113 Ohio St. 662, 150 N.E. 42 (1925); *State* ex rel. *Balce v. Hauser,* 111 Ohio St. 402, 145 N.E. 851 (1924); See, *State v. Kreuzweiser,* 120 Ohio St. 352, 166 N.E. 228 (1929). Of course, where the contemplated use will be a nuisance, a permit issued prior to the enactment of an ordinance prohibiting such use may be revoked even though there has been substantial reliance and thus expense incurred and some construction begun. *State v. Rendigs,* 98 Ohio St. 25, 120 N.E. 836 (1918). This holding is consistent with the general view that a use which is a nuisance may be prohibited at any time.

The *Jones* rule has been further restricted by limiting expansion and alteration so as ultimately to eliminate the nonconforming use. BASSETT, ZONING 109 (1940). This question is largely one of statutory interpretation and the case law is in great conflict; thus the rules of the particular jurisdiction must be examined. The cases would indicate that two theories are followed. The first is that the use may be restricted to the area of original lot but must be allowed to expand naturally therein. See, In re *Gilfillan's Permit,* 291 Pa. 358, 140 Atl. 136 (1927). The other theory strictly confines the use to exact use existing when the ordinance was enacted. See, *Billerica v. Quinn,* 320 Mass. 687, 71 N.E. 2d 235 (1947). Extra limitation raises questions as to constitutionality. YOKELY, ZONING LAW & PRACTICE, §§153 to 157, inclusive (2d ed. 1953).

Once the vested right has been established, Ohio allows much limitation on subsequent uses, changes, alterations, and extensions in that use. In *State v. Stenger,* 120 Ohio St. 418, 166 N.E. 226 (1929), an ordinance providing that a nonconforming use in a residential district could either be extended or substituted with another business, but not both, was held a valid exercise of the police power. The extent to which the existing use of the property was limited in the *Stenger* case certainly approaches the limitation which Akron attempted to impose in the principal case. Nevertheless, provided there is a reasonable relation to the public welfare, strict limitation upon subsequent additions or uses has been held

valid. *Gwyn v. Trimedge, Inc.*, 158 Ohio St. 307, 109 N.E. 2d 1 (1952). Where a change to a use of a higher classification was made, it was held that such change was within the purview of an ordinance which allowed existing nonconforming use to continue. *Mahoning Express Co. v. Youngstown*, 15 Ohio L. Abs. 745 (1933).

A significant inroad has been made on the rule of the *Jones* and *O'Connor* cases, *supra*, by a recent New York decision. Defendant had kept pigeons on his property prior to an ordinance prohibiting such use, but the court ordered that use discontinued holding that a nonconforming use must be allowed to continue only if termination causes financial loss to the property owner by rendering valueless his improvements or his business. The court recognized the general rule that an existing nonconforming use is constitutionally protected. *People v. Miller*, 304 N.Y. 165, 106 N.E. 2d 34 (1952).

Judicial reaction to magnitude of the taking as a factor affecting constitutionality suggests as a possible solution to the nonconforming use problem, the amortization principle, under which the owner is given a specific period of time, related to the nature of the use and the type of construction, within which the nonconforming use must be eliminated. See notes, 9 U. OF CHI. L. REV. 477 (1942); 35 VA. L. REV. 348 (1949). Many cities have adopted such provisions; however, there is very little judicial opinion as to the principle's constitutionality. A Tallahassee, Florida ordinance giving an owner ten years to terminate the use of a nonconforming filling station was recently upheld in the Fifth Circuit Court as a reasonable exercise of the police power. *Standard Oil Co. v. Tallahassee*, 183 F. 2d 410 (5th Cir. 1950). Writers also indicate that the two *Dema Realty* cases from the Louisiana Supreme Court, *supra*, stand for the proposition that amortization is a proper method to eliminate nonconforming uses; however the time limit of one year seems harsh and the reasoning in those cases was confused by the court's views on nuisance law and zoning.

No Ohio court has construed an ordinance using the amortization principle as a means of eventually terminating an existing nonconforming use. However, the Akron ordinance in the principal case providing for discontinuance after a reasonable period of use is similar in purpose and effect. But because of the discretion vested in the council as to precisely when the use will end and thus the possibility of arbitary application, the principle of the Akron ordinance and strict amortization may be distinguished. It is hoped that the supreme court has not foreclosed the question of the constitutionality of the amortization principle. Ordinances incorporating amortization are the only feasible way to eliminate

nonconforming uses and thus accomplish the purpose of comprehensive zoning, namely, uniformity of use.

Donald W. Wiper, Jr.

CONSTITUTIONAL LAW — REFUSAL TO TAKE JURISDICTION ON A WRIT OF MANDAMUS

This was an original action in mandamus instituted by relator in the supreme court against the Industrial Commission and three of its members. The prayer of the petition was "that a . . . writ of mandamus issue commanding the respondents to vacate and set aside their order..." which was adverse to the relator. Respondent demurred, raising the question of whether relator was entitled to an issuance of the writ by the supreme court. Held: Writ denied. *State* ex rel. *Allied Wheel Products, Inc. v. Industrial Commission,* 161 Ohio St. 555, 120 N.E. 2d 421 (1954).

The Ohio Constitution provides that the supreme court shall have "original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and precedendo," and that, "No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court." OHIO CONST., ART. IV, SEC 2.

In general it is said that mandamus is an extraordinary writ and will not issue unless there is a clear legal right and an absence of any other adequate remedy. *State* ex rel. *Roth v. West, Dir. of Finance,* 130 Ohio St. 119, 197 N.E. 115 (1935). Pursuant to the above rule the court has refused to issue the writ, for example, where the relator had an administrative appeal which had not been exhausted, *State* ex rel. *Stein v. Sohngen,* 147 Ohio St. 359, 71 N.E. 2d 483 (1947), or an appeal to common pleas court which had not been used. *State* ex rel. *Campbell v. Bryant, Director of Liquor Control,* 158 Ohio St. 495, 110 N.E. 2d 137 (1953). The issuance of the writ of mandamus rests within the sound discretion of the court which is asked to issue it. *State* ex rel. *Roth v. West, supra.* The discretion exercised in these cases is substantive discretion, *i.e.* after the court has allowed the mandamus proceeding and the parties have presented their evidence, the writ is granted or denied depending upon the absence or presence of another adequate remedy.

In the present case, however, the court refused to allow a mandamus proceeding and denied its jurisdiction without passing on the merits of the relator's claim for mandamus. The court reasoned that, "Since both the common pleas court and the court of appeals have the power and authority to issue such a writ this court, *in the exercise of its discretion,* should use some discrimination in determining whether the controversy involved in an original

action for mandamus in this court is such as to justify bringing the cause immediately to the supreme court instead of presenting it in the first instance to the common pleas court or perhaps the court of appeals." (Emphasis supplied) In so holding, the court exercised procedural discretion, *i.e.* the court disallowed the mandamus proceeding, declaring that ordinarily the proceeding itself will be denied where the relator has another adequate jurisdiction and the right involved is a private one. This discretion is usually governed by constitution, statute or court rules. ILLINOIS SUPREME COURT RULE 46; VERNON'S TEXAS RULES OF CIVIL PRACTICE, RULE 474; OKLAHOMA SUPREME COURT RULE 27; NEW MEXICO SUPREME COURT RULE 24 or NEW MEXICO CONST. ART-4, SEC. 4; NORTH DAKOTA REV. CODE OF 1943, §27-0204.

As precedent for relegating relator to either the common pleas court or the court of appeals, the court cited *State* ex rel. *Werden v. Williams*, 26 Ohio St. 170 (1870). In the *Werden* case it appears the supreme court denied its original jurisdiction of mandamus, saying that ". . . where circumstances do not justify the taking of the case out of its order for hearing, it can more speedily and conveniently be heard in the District Court." The court in the *Werden* case further stated that this was the rule of practice adopted by the court in regard to writs of error and writs of habeas corpus citing *Benham v. Conklin*, 3 Ohio St. 509 (1853), and Ex parte *Shaw*, 7 Ohio St. 81 (1857).

In *Benham v. Conklin, supra*, the supreme court refused leave to file a petition in error to reverse judgment of the common pleas court because relief could be had in the intermediate district court without leave, and there was no special reason why it should be granted. By refusing leave to petition, the court was exercising *procedural discretion;* and in so doing conformed to Ohio Const. Art. IV, Sec. 2 (1851) and 51 OHIO LAWS. 57, sec. 514. In Ex parte *Shaw, supra*, the relator, a prisoner in the Ohio Penitentiary, applied to the supreme court for a writ of habeas corpus. Basis for the writ was the assertion that the sentence of a lower court was erroneous. The court held that writ of error and not habeas corpus was the proper remedy, pointing out that habeas corpus could not be used as a short cut for appeal. It should be noted that the court in this case allowed its jurisdiction to be invoked but denied the writ in the exercise of substantive discretion, after the evidence was presented.

It is difficult to see how these two cases support the holding in the *Werden* case, where the court refused to allow its original jurisdiction to be invoked. The *Werden* case gives very few facts and it is difficult to determine exactly what was sought in the petition, beyond the fact that there was a request for mandamus. A

reasonable view, however, is that the relator in that case asked that a petition in mandamus be heard in advance of its order on the supreme court docket in accordance with Ohio Supreme Court Rule 2, 14 Ohio St. (v) sec. 4 (1862) which provided that "Causes will be taken up for decision in their order on the docket, and not otherwise, except that on motion duly filed, and for special reason, a case may be taken out of its order, and assigned for hearing or decision at a particular time." The reference in the *Werden* opinion to justification for taking a case out of its order of hearing, it is submitted, adds credence to this theory.

Be that as it may, *Werden v. Williams,* apparently became a precedent for the court's exercise of procedural discretion in determining whether to entertain suits for writs of mandamus. This discretion was practiced by requiring parties to obtain leave to file a petition for the writ. *State* ex rel. *The City of Toledo v. Lynch,* 87 Ohio St. 444, 101 N.E. 352 (1913). The records of the debates in the Constitutional Convention of 1912 seem to indicate that this practice of the supreme court was the chief cause for the amendment to the constitution which was adopted following that convention to the effect that "No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court." OHIO CONST, ART IV, SEC. 2.

In support of the above amendment Mr. Mauk, delegate from Gallia County, said: "The Supreme Court for a number of years has required everyone seeking to invoke the jurisdiction to first get the consent of the court to file his appeal. The result has been in quo warranto and mandamus and other cases in which the original jurisdiction has been invoked, the court has required suitors to go to the circuit court. . . . We have taken from the supreme court one-half or more of all its jurisdiction when we have secured the ratification of the Peck proposal, and that being so there is no longer any reason why the supreme court cannot exercise the jurisdiction conferred on it by this amendment to the constitution." OHIO CONSTITUTIONAL CONVENTION, PROCEEDINGS AND DEBATES, Vol. 2, p. 1831 (1912).

From this it would appear that the purpose of the amendment was to end the procedural discretion then being exercised by the supreme court. This purpose was given court sanction when the supreme court held invalid its old requirement of leave to file petitions in original actions in the supreme court. *State* ex rel. *City of Toledo v. Lynch,* 87 Ohio St. 444, 101 N.E. 352 (1913). The court in the *Lynch* case said that it was "a *practice* (emphasis supplied) long since established and consistently adhered to in this court to require leave to file petitions invoking the exercise of its original jurisdiction." The court went on to say that the require-

ment "Has not been made pursuant to any statute or to any formal rule published in the book of rules." In speaking of the 1912 amendment to Art. IV, sec. 2, the court said, "The language of the provision will not permit the court either to adopt or *adhere* to a rule which requires permission to invoke the exercise of its jurisdiction." (emphasis supplied) *State* ex rel *City of Toledo v. Lynch, supra.* The court in the principal case disposes of the argument for application of the amendment by saying that "This court therefore cannot and will not adopt any rule preventing anyone from invoking its original jurisdiction in mandamus." In this respect, it is significant to note that the denial of its jurisdiction by the supreme court prior to the 1912 amendment was not pursuant to any statute or formal rule.

The actual effect of the decision in the principal case would appear to be a resumption on the part of the supreme court of the exercise of procedural discretion by making a preliminary finding as to the nature of the right to be redressed before allowing its jurisdiction to be invoked, thus affording itself two opportunities for discretionary action, *i.e.* procedural discretion before its jurisdiction is invoked and substantive discretion after the evidence has been produced, provided it decides in the first instance to hear the case. It is perhaps true, as pointed out by the court in its opinion, that the original jurisdiction granted to the supreme court places an excess burden upon the court whose principal jurisdiction is appellate; and perhaps, as urged in an article on this subject, our system of extraordinary writs is antiquated and should be replaced by simpler methods of procedure. *The Original Jurisdiction of the Ohio Supreme Court,* 7 OHIO ST. L. J. 27 (1940). However, it is the writer's belief that any revision of original jurisdiction of the supreme court could be more effectively accomplished and the rights of litigants more specifically defined by means of a constitutional amendment than by court decision.

Bernard V. Fultz

CRIMINAL LAW — SEARCH AND SEIZURE — LIMITATION UNDER EXCLUSIONARY RULE

Defendant, president and manager of an incorporated social club, was convicted for the unlawful possession of slot machines. A motion to suppress the evidence on the grounds that the slot machines had been seized in violation of rights guaranteed by both the state constitution (S.H.A. CONST. ART. 2, SEC. 6, 10) and the Fourth Amendment of the U. S. Constitution was denied by the trial court. On appeal, *held,* affirmed. Defendant, as a shareholder or an employee, did not have sufficient interest in the slot machines, which were the property of the corporation, to cause their

exclusion as evidence. *People v. Perry,* 1 Ill. 2d 482, 116 N.E. 2d 360 (1953).

At common law it was held that the admissability of evidence was not affected by the illegality of the means through which the evidence was obtained. 1 GREENLEAF, EVIDENCE § 254a (12th ed. 1896); 5 JONES, EVIDENCE §§ 2075 n.3 and 2076 n.6 (2d ed. 1926); 8 WIGMORE, EVIDENCE § 2183 (3rd ed. 1940); Fraenkel, *Recent Developments in the Law of Search and Seizure,* 13 MINN. L. REV. 1 (1928). Although the common law rule was followed by the Supreme Court as late as 1904, *Adams v. New York,* 192 U.S. 585 (1904), the embryonic federal "exclusionary rule" had been conceived much earlier in *Boyd v. United States,* 116 U.S. 616 (1885). After the temporary respite of the *Adams* case the rule was born in 1914 and has flourished in our federal courts ever since. *Weeks v. United States,* 232 U.S. 383 (1914). For a more detailed treatment of the rule and its subsequent modifications there is an abundance of excellent legal commentaries. For history, see, Cornelius, SEARCH AND SEIZURE, § 8 (8) (2d ed. 1930); 8 WIGMORE, EVIDENCE, § 2184 (3rd ed. 1940); LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937). For more recent developments, see Mezansky, *The Battle of the Fourth Amendment,* 20 PENN. BAR ASSN. QUART. 231 (1948-49); Magill, *Towards a More Liberal Connstruction of the Fourth Amendment,* 27 DICTA 13 (1950); note, 38 J. CRIM. L. 244 (1948-49). Illinois adopted the *Weeks* doctrine in 1924, *People v. Castree,* 311 Ill. 392, 143 N.E. 112 (1924) and reaffirms its allegiance in the instant case.

Those who adhere to the rule usually argue that if evidence which is the result of an illegal search is admitted, the Fourth Amendment will be nullified, *Bell v. Hood,* 71 F. Supp. 813 (Cal. D., 1947); 8 A.B.A.J. 646 (1922); Glenn, *Evidence Obtained by Illegal Search and Seizure,* 22 KY. L. J. 63 (1933-4) and that if illegally seized evidence were allowed to be used against the one from whom it was seized he would, in effect, be compelled to give evidence against himself thereby violating his rights under the Fifth Amendment. *Gouled v. United States,* 255 U.S. 298 (1921); Cornelius, SEARCH AND SEIZURE, § 2 (2) (2d. ed. 1930); but see *infra.* The rule has been the subject of vituperation by commentators, at least one of whom has achieved no little stature in the field of evidence. See 8 WIGMORE, EVIDENCE, § 2184 (3rd ed. 1940); Comment, 31 YALE L.J. 518 (1921-22); 8 CORNELL L.Q. 76 (1922-23). The usual contention is that the courts, in applying the rule, have illogically confused the Fourth and Fifth Amendments binding the two together in a manner that was not in the minds of the framers. However, there is reason to believe that the Supreme

Court in deciding that the Fourth and Fifth Amendments are intimately connected, *Boyd v. United States,* 96 U.S. 727 (1877) had ample historical precedent dating back to 1765. *Entick v. Carrington, State Trials,* XIX, 1029 (1765); Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 109. Other commentators suggest that the Fourth Amendment stands alone, pointing out the inconsistency that permits a corporation to raise the exclusionary rule, *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920) yet denies them the protection of the self incrimination privilege of the Fifth Amendment. *Wheeler v. United States,* 226 U.S. 478 (1913). This inconsistency combined with similar incongruous decisions in cases involving confessions and deportations leads them to conclude the exclusionary rule is a result of judicial expansion of the Fourth Amendment or a "McNabb type" rule. Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence,* 15 So. CALIF. L. REV. 60 (1941); Comment 14 OHIO ST. L. J. 214 (1953). Other writers see the opinion in *Wolf v. Colorado,* 338 U.S. 25 (1949) as a disposition on the part of the court to free the exclusionary rule from any reliance on the Fifth Amendment. Allen, *The Wolf Case: Search and Seizure, Federalism, and Civil Liberties,* 45 ILL. L. REV. 1 (1950). Those who would challenge the rule also extend the theory that a liberal application hamstrings law enforcement and coddles wrongdoers. Waite, *Public Policy and the Arrest of Felons,* 31 MICH. L. REV. 749 (1933).

The rule is not without conditions, as can be evidenced from the plight of the defendant in the instant case. The courts say that a person seeking to invoke the privilege under the rule must have an interest in the property seized. *Lewis v. United States,* 92 F. 2d 952 (10th Cir. 1937). This is necessary since it is a constitutional privilege and therefore available only to the one whose rights have been infringed. *United States v. DeVasto,* 52 F. 2d 26 (2d Cir. 1931). The court in the instant case follows precedent in holding that the defendant neither as an officer of a corporation, *Lagow v. United States,* 159 F. 2d 843 (2d Cir. 1946) nor as an employee of the corporation, *United States v. Mandel,* 17 F. 2d 270 (D. Mass. 1927); *Kelley v. United States,* 61 F. 2d 843 (8th Cir. 1932) or more precisely as a member of an incorporated fraternal order, *United States v. Wainer,* 49 F. 2d 789 (W.D. Pa. 1931) can raise the privilege. Another condition on the rule is that one seeking its protection must first make a motion to suppress the evidence. 1 WHARTON, CRIMINAL EVIDENCE, § 376 (11th ed. 1935). The Illinois courts require the defendant to claim ownership of the property and request its return. *People v. Edge,* 406 Ill. 490, 34 N.E. 2d 359 (1941). In the instant case the court points out that, even though

the defendant might have held an interest as a club member, he did not request the return of the slot machines which would raise the issue of the legal sufficency of his motion. A third requisite of the rule as applied in federal courts is that only evidence obtained by federal officers will be barred and not that obtained by state officers or private persons. *Burdeau v. McDonald,* 256 U.S. 465 (1926). However, when a federal officer participated in a search with state officers the evidence was then excluded. *Byars v. United States,* 273 U.S. 28 (1927).

These conditions on the rule are apparently a manifestation of the doctrinal motion on behalf of the courts that the rule resembles relief awarded to a defendant in the form of a tort counterclaim against the prosecution against illegal search or, in short, a remedy. *Connolly v. Medalie,* 58 F. 2d 629 (2d Cir. 1932). Yet if this be true the defendant cannot be said to be protected from the search since the remedy is not available until after the illegal act has taken place. Furthermore, if the rule is to be treated as a remedy it is inconsistent, since if the victim is not prosecuted no remedy is available, or if he is prosecuted and found innocent the remedy is worthless. See comment, 58 YALE L. J. 144 (1948). But if the purpose of the rule is not remedial, but serves as a deterrent to illegal search, then the exceptions are unnecessary since the rule no longer becomes a personal remedy.

The problem raised in the instant case, of who has sufficient interest to raise the privilege, is of purely academic interest in Ohio since the Ohio courts follow the orthodox or common law rule that evidence obtained by illegal search is not rendered inadmissible. *State v. Lindway,* 131 Ohio St. 166, 2 N.E. 2d 490 (1936).

It would seem then that defendants in cases such as the principal case, are placed in the anomalous position of having enough interest in the property seized to warrant conviction, but not enough to allow the protection of the exclusionary rule. A similar circumstance is found in the law of larceny with respect to the possession of stolen goods. 2 WHARTON, CRIMINAL EVIDENCE, § 1070 (11th ed. 1935). The illogic of limiting the protection of the rule to corporations itself is evident since only the shareholders, officers, employees or members can be said to have suffered an undue invasion of privacy. Comment, 58 YALE L.J. 144 (1948). However, as long as the right of privacy remains a fundamental right it would seem that the exclusionary rule is superior to other suggested remedies, although one cannot help thinking that it might draw closer to achieving its purpose if the courts would declare a shareholder the possessor of enough of a proprietory interest to raise the privilege. The Supreme Court has given a hint that they feel the rule should be extended to all the states, but they feel

bound by the decision in *Wolf v. Colorado, supra, Irvine v. California,* 347 U. S. 128 (1954). In any event most Illinois defendants have been infinitely more successful than the defendant in the principal case. One study shows that during the year 1950, ninety-nine and seven-tenths percent of all the motions to suppress were granted in the Chicago Municipal Court in gambling cases. Another study indicates seventy percent of all gambling cases brought before the same court are dismissed on a motion to suppress the evidence because of illegal search and seizure. Dash, *Cracks in the Foundation of Criminal Justice,* 46 ILL. L. REV. 385 (1951-52).

Charles D. Hering, Jr.

LEGAL PROFESSION — DISBARMENT FOR CONTEMPT IN DEFENDING COMMUNISTS

At the conclusion of the long trial of the eleven Communists for violation of the Smith Act, Judge Harold Medina summarily convicted the six defense attorneys for contempt of court. On the basis of this action, the Association of the Bar of the City of New York and the New York County Lawyers' Association instituted disbarment proceedings in the district court against Harry Sacher, one of these attorneys. Judge Hincke held that, although the record contained no indication of moral turpitude, Sacher should be disbarred for having showed "such excess of zeal in representing his clients that it obscured his recognition of responsibility as an officer of the court" [quoted, In re *Sacher,* 206 F. 2d 358, 359 (2d Cir. 1953)]. Subsequently the United States Supreme Court, in a divided opinion, affirmed Judge Medina's judgment of contempt. The opinion was limited to the issues of the propriety of a summary conviction and the right of Sacher to a jury trial. *U. S. v. Sacher,* 343 U.S. 1 (1953). Thereafter, Sacher appealed his disbarment. The Court of Appeals affirmed, Judge Clark dissenting. *Sacher v. Bar etc. of N.Y.,* 206 F. 2d 358 (2d Cir. 1953). On appeal to the United States Supreme Court, *held,* reversed and cause remanded. The Court, Justice Reed dissenting, was of the opinion that permanent disbarment was unnecessarily severe. *Sacher v. Bar etc. of N.Y.,* 347 U.S. 388 (1954).

Early cases limited disbarment to statutory grounds. In re *Collins,* 147 Cal. 8, 81 Pac. 220 (1905); In re *Eaton,* 4 N.D. 514, 62 N.W. 597 (1895). But now statutory grounds are not regarded as exclusive. In re *Bailey,* 30 Ariz. 407, 248 Pac. 29 (1926); *Wood v. State* ex rel *Boykin,* 45 Ga. App. 783, 165 S.E. 908 (1932); In re *Zirinsky,* 234 App. Div. 464, 255 N.Y. Supp. 492 (1932). As Chief Justice Taney once said, in Ex parte *Secombe,* 19 How. 9 (1856), "It is difficult if not impossible, to enumerate and define, with

legal precision, every offense for which an attorney or counsellor ought to be removed."

In considering this subject it is necessary to remember that *disbarment is not a punishment,* even though in the principal case the Supreme Court describes the judgment as "unnecessarily severe." It is an action of the bar to protect itself and the public. Ex parte *Wall,* 107 U.S. 265 (1882); In re *Rouss,* 221 N.Y. 81, 116 N.E. 782 (1917); Ex parte *Brounsall,* 2 Cowp. 829 (1778); In re *Conner,* 357 Mo. 270, 207 S.W. 2d 492 (1948); In re *Beakley,* 6 Wash. 2d 410, 107 P. 2d 1097 (1940). The courts continually remind us that the power to disbar should be exercised with great caution, and only when the attorney is utterly unfit to be an officer of the court. In re *Sizer,* 306 Mo. 356, 267 S.W. 922 (1924).

By taking a narrow view of the few cases in this area the district court's decision of disbarment can be supported, but careful analysis reveals that in most examples of disbarment after contempt, the contempt in question was one of a different character from the "excessive zeal" apparent here. In re *Elam,* 357 Mo. 922, 211 S.W. 2d 710 (1948) (Disbarment for attitude and conduct flagrantly disrespectful to trial court involving also personal attacks on opposing counsel and conflicting interests); In re *Richeson,* 64 Ariz. 85, 166 P. 2d 583 (1946) (Disbarment for groundless and malicious charges against judges; the "wild, imaginery bases relied upon indicate his mental instability, and lack of moral values"); In re *Hanson,* 93 Wash. 392, 160 Pac. 1141 (1916) (Attorney's petition for rehearing showed utter disrespect and plainest intention to express contempt. The attorney persisted and was suspended till further order of the court.); *People* ex rel. *Chicago Bar Association v. Standidge,* 333 Ill. 361, 164 N.E. 844 (1928) (Attorney falsely charged appellate judges with willfully and corruptly making false findings and was suspended for six months); In re *Graves,* 64 Cal. App. 330, 221 Pac. 411 (1923) (libel of judge concerning official acts by attorney); *United States* ex rel. *Hallet v. Green,* 85 Fed. 857 (Cir. Ct. Colo. 1898); *Matter of Humphrey,* 174 Cal. 290, 163 Pac. 60 (1923).

People ex rel. *Chicago Bar Association v. Hanson,* 316 Ill. 502, 147 N.E. 431 (1925) and In re *Damron,* 131 W. Va. 66, 45 S.E. 2d 741 (1947) emphasize the exaggerated conduct needed to amount to grounds for disbarment. In the former case, the court said that to disbar, proof of misconduct and fraudulent and dishonest motives accompanying it must be clear, and in the latter said that an attorney may not be disbarred for contempt of court unless his act or course of conduct amounts to base and aggravated contempt. See In re *Doe* 95 F. 2d 386 (2d Cir. 1938) (Disbarment is fitting only where there is corrupt conduct); also Ex parte *Bradley,* 7

Wall. 364 (1868) and *Bradley v. Fisher*, 313 Wall. 335 (1871) a related case.

In contrast with the principal case, consider the case of In re *Isserman*, 345 U.S. 286 (1953) — proceedings arising from the same trial (*United States v. Dennis et al, supra*) as the *Sacher* case. In that case, permanent disbarment was approved by a divided court. Isserman had previously been suspended for a short time as the result of a conviction on a statutory rape charge. That was 1924. For his conduct in the *Dennis* trial he had been disbarred in New Jersey. Since the federal courts usually follow the state courts as to eligibility to practice law, Isserman was called to show cause why he should not be disbarred. Four of the justices held that Isserman had not shown cause, and that the decision of permanent disbarment below should be upheld. Four held that they couldn't recall a case where an attorney was disbarred solely for contempt of court, yet they did recall several cases where attorneys were convicted of serious contempts, of this same nature, without their standing at the bar being brought in question. The William M. Tweed trial was cited as an example. *Tweed v. Davis*, 1 Hun. 252 (N.Y. 1874). The attorneys there were David Dudley Field, later president of the American Bar Association, and Elihu Root. As the Supreme Court was split four and four, Justice Clark not participating, the decision of the lower court was allowed to stand.

On October 14, 1954, more than a year after the decision in the *Isserman* case, and after the *Sacher* case had been decided, the Supreme Court, on rehearing in a per curiam decision held that Isserman should be reinstated on the basis of a Supreme Court rule, passed after the decision in that case, that disbarment of an attorney must be approved by a majority of the court. Rule 8 — REVISED RULES OF THE SUPREME COURT OF THE U.S. — Effective July 1, 1954. This was a 4 to 3 decision, 2 justices not participating. In re *Disbarment of Isserman*, 23 Law Week 3091 (1954).

In the principal case the burden was on the Bar Association to show grounds for disbarment, since, unlike Isserman, Sacher had not been previously disciplined in a state proceeding. Sacher was not being called upon to show cause. Further, he had no previous blemish on his record, and the court was well aware of his fine work in the past.

The courts in all stages of this case emphasized that they will support attorneys who defend unpopular causes and clients. And surely the disbarment proceedings in this case can be said to rest on the distinction between the defense of an unpopular client, and the manner of conducting such defense. Knowing, however, the public's identification of an attorney with his client, and their somewhat less than judicial temperament, this case serves as a

warning to the Bar to keep an alert eye to see that persecution of attorneys saddled with unpopular clients does not occur. The minutes of Bar proceedings are replete with resolutions respecting the traditional duty of members of the bar to defend the most indefensible. REPORTS OF AMERICAN BAR ASSOCIATION (1953) Vol. 78, p. 304; NEW YORK STATE BAR BULLETIN, July 1952, p. 219. But it is still true that actions speak louder than words, and positive steps should be taken to emphasize to the layman the Bar's support both of these attorneys, and of the ethical principle of counsel for the most heinous and detested of defendants.

John Yeatman Taggart

NEGOTIABLE INSTRUMENTS — COGNOVIT NOTES — JOINT AND SEVERAL JUDGMENTS

In 1929, the plaintiff and her husband signed a one year cognovit note payable to the defendant. The note read in part "*** Andy and Elizabeth Kender promise to pay *** and (*blank*) hereby authorize any Attorney at Law to appear in any Court of Record in the State of Ohio, or in any other state in the United States after the above obligation becomes due, and waive the issuing and service of process and confess a judgment against (*blank*) in favor of the holder hereof ***." The makers defaulted on the note, and in 1945 a judgment by confession was rendered against the plaintiff, Elizabeth Kender, for the amount of the note plus interest. In the present action the plaintiff asked the Common Pleas Court of Montgomery County to vacate the judgment and permanently restrain the enforcement of the cognovit clause in the note since plaintiff's husband who had died prior to the first suit was not a party to the confession of the judgment and, therefore, not joined as a defendant. *Held,* for the plaintiff. The court indicated that the language of the instrument grants authority to confess a joint judgment against the parties signing a cognovit note, but under the rule of strict interpretation applicable to cognovit notes the implication will not be extended so as to authorize confession of a several judgment against either of the parties. *Kender v. Farkas,* 66 Ohio L. Abs. 54, 99 N.E. 2d 334 (1951).

The general rule has been stated to be that the warrant of an attorney to confess judgment is revoked by the death of one of the joint obligors. 23 O. JUR. 742; See Note, 44 A.L.R. 1310. This general rule has been adopted by Ohio. *Hoffmaster v. G. M. McKelvey Co.,* 88 Ohio St. 552, 106 N.E. 1061 (1913); *Saulpaugh v. Born,* 22 Ohio App. 275, 154 N.E. 166 (1925); *Haggard v. Shick,* 151 Ohio St. 535, 86 N.E. 2d 785 (1949).

The major problem that the court encountered was deciding whether the words "Andy and Elizabeth Kender" impart a joint

or a several obligation. Even prior to the adoption of the Negotiable Instruments Law courts accepted certain statements as imposing both joint *and* several liability. For example, the words "I promise to pay" in an instrument signed by two or more persons, constitute a joint and several promise. *Wallace v. Jewell,* 21 Ohio St. 163 (1871); *First National Bank v. Fowler,* 36 Ohio St. 524 (1881). The N.I.L. adopted this interpretation. OHIO REV. CODE § 1301.19 G (NEGOTIABLE INSTRUMENTS LAW § 17-7). There is also a general rule of law which defines joint liability. Section 112 of The Restatements of Contracts sets down the general rule [qualified only by section 115, in essence, Ohio Rev. Code § 1301.19 G (see above), and section 116 concerning joint endorsers] that "where two or more parties to a contract promise the same performance to the same promisee, they incur only a joint duty unless the contrary is stated, or unless the terms of the promise or the extrinsic circumstances indicate an intention on their part to be bound severally, or jointly and severally...." RESTATEMENT, CONTRACTS § 112 (1932).

The power of an attorney to confess a judgment is peculiarly limited by Ohio law. In *Haggard v. Shick, supra,* the Ohio Supreme Court said, "A warrant of attorney authorizing the confession of only a joint judgment against the makers of a note does not authorize confession of any judgment after the death of one of the makers." The court in that case was using the rule stated in *Spence v. Emerine,* 46 Ohio St. 439, 21 N.E. 866 (1889), that "... authority given by warrant of attorney to confess a judgment against the maker of the note, must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties." In short, the court reaffirmed the Ohio rule that the power of attorney to confess judgment must be strictly construed. *Cushman v. Welch,* 19 Ohio St. 536 (1869); *Shuck v. McDonald,* 58 Ohio App. 398, 16 N.E. 2d 621 (1938); *Cartmell v. First National Bank and Trust Co.,* 10 Ohio L. Abs. 689 (1930).

It is a general rule in Ohio and in other states that a note signed by two makers and reading "we promise to pay" is a joint note only. See *Avery v. Vansickle,* 35 Ohio St. 270 (1879); *McCoy v. Jones,* 61 Ohio St. 119, 55 N.E. 219 (1894). Even a note with the words reading "the undersigned promise to pay" has been held to be a joint obligation only. *Miller v. Dime Savings Bank Co.,* 18 Ohio L. Abs. 627 (1935).

The court in the principal case, therefore, came to the conclusion that the words "Andy and Elizabeth Kender" were to be construed as if the pronoun "we" were present and it accordingly held that the authority to confess judgment was joint only.

The principal case illustrates the effect of the rule of strict

interpretation in the field of cognovit notes. Because of this rule it seems that every ambiguous cognovit note in Ohio that is signed by two or more persons must be construed to confer only authority to confess a joint judgment, and the death of one of the co-makers will deprive a plaintiff of the cognovit remedy. However the plaintiff may still be able to join the remaining obligor and the deceased maker's estate to obtain a judgment since the right to recover the loaned money is not barred unless the statute of limitations has run.

Howard Webster Bernstein

STATE TAXATION — GIFTS IN CONTEMPLATION OF DEATH — BURDEN OF PROOF

Decedent had transferred her farm to the taxpayer, her son, within two years prior to her death without receiving valuable consideration. In the determination of the succession tax by the probate court, the property was included in the decedent's estate. On appeal, *held,* affirmed. The person claiming that the transfer was not made in contemplation of death has the burden to so prove by a preponderance of the evidence, and that burden was not met. In re *Estate of Walker,* 161 Ohio St. 564, 120 N.E. 2d 432 (1954).

The primary problem for the supreme court's determination was the construction that should be given the following Ohio statute:

> Any transfer of property from a resident or of property within this state from a non-resident, if shown to have been made without a valuable consideration substantially equivalent in money or money's worth to the full value of such property, if so made within two years' prior to the death of the transferor, shall, *unless shown to the contrary,* be deemed to have been made in contemplation of death within the meaning of this title.... OHIO REV. CODE § 5731.04. (Italics added).

In cases involving this and similarly worded statutes the majority of the courts have stated that the burden was cast upon the donees to show that gifts within this period were not made in contemplation of death. *Tax Commission of Ohio v. Parker,* 117 Ohio St. 215, 158 N.E. 89 (1927); *Estate of Meyers,* 26 Ohio N.P. 57 (1926); *Estate of Hildebrandt,* 86 Ohio App. 246 (1949); *Wickwire v. Reinecke,* 275 U.S. 101 (1927); *Estate of Buck,* 176 N.Y. Misc. 848 (1941); *Mann's Estate,* 219 Iowa 597, 258 N.W. 904 (1935); 38 O. JUR. TAXATION § 432. But these same cases do not indicate the quantum or degree of evidence which must be presented by the taxpayer, the instant case seeming to be the only Ohio Supreme Court case which determines this problem.

Now, if the statute in question be considered as creating a presumption that the gift was made in contemplation of death, it

would seem that the one against whom the presumption arises would need only to produce just enough evidence to counterbalance that presumption. In construing a statute which created a rebuttable presumption of negligence, the Ohio Supreme Court in *Klunk v. Hocking Valley Ry. Co.*, 74 Ohio St. 125 77 N.E. 752 (1906), stated that, "The general rule would seem to be well esablished by an almost unbroken line of authority, that to rebut and destroy a mere prima facie case, the party upon whom rests the burden of repelling its effect, need only to produce such amount or degree of proof as will countervail the presumption arising therefrom... it need not overbalance or outweigh it." See also *Brunny v. Prudential Insurance Co.*, 151 Ohio St. 86, 84 N.E. 2d 504 (1949); *Kennedy v. Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928); 17 O. JUR. EVIDENCE § 115; 17 O. JUR. EVIDENCE § 73; TRACY, HANDBOOK OF THE LAW OF EVIDENCE 30 (....); WIGMORE, EVIDENCE § 2491 (3rd ed. 1940). Also, more specifically with respect to taxation, Corpus Juris Secundum states, "The state has the burden of proving that the transfer has been made in contemplation of death, but, where it establishes that the transfer falls within the terms of a statute creating a presumption that it has been made in contemplation of death, the burden is then on the taxpayer to go forward with evidence to rebut the presumption." 85 C.J.S. TAXATION § 1147 (2) C (1954). This last quotation is congruent with the general rule that presumptions do not change or shift the burden of proof; rather, their effect is only to change the duty of going forward with the evidence after the party having the burden in the sense of the risk of non-persuasion has made out a prima facie case. *Klunk v. Railway*, supra; *Brunny v. Insurance Co.*, supra; *Shepard v. Insurance Co.*, 152 Ohio St. 6, 87 N.E. 2d 156 (1949); 17 O. JUR. EVIDENCE § 115; WIGMORE, EVIDENCE, § (3rd ed. 1940).

This being so, then who has the burden of proof in succession tax cases? As the supreme court stated in the instant case, it is fundamental law that the burden generally is upon the taxing authority to show that any particular property or transfer comes within a tax statute. Clearly, in the case of gifts made more than two years before the transferor's death, the burden of proving that the gifts were made in contemplation of death is upon the taxing authority. *Estate of Robinson*, 145 Ohio St. 55, 60 N.E. 2d 615 (1945). Also, the court has stated that the statute is one creating a rebuttable presumption. *Estate of Robinson*, supra; *Estate of Thompson*, 147 Ohio St. 119, 68 N.E. 2d 71 (1946).

Thus we find that the burden herein was originally upon the state; that the gift being made within two years of death and without a valuable consideration, the State was aided by a rebuttable presumption; that this ordinarily transfers only the duty of

going forward to present some evidence in rebuttal.

The supreme court in the instant case reached a different conclusion. In examining the wording of the statute, the court found that "unless shown to the contrary" means "to show"; to "make clear by evidence"; thus, to *prove by a prepondarence.* These words did not appear in the statute involved in *Klunk v. Railway, supra,* in which the statute was held to have created a rebuttable presumption. The court in the instant case stated, "If, then, the statute involved in the present case read simply that if a transfer is made within two years prior to the death of a transferor and without sufficient consideration it shall be deemed to have been made in contemplation of death, a different question would be presented." The inference of this decision is that the statute involved effects more than a mere presumption; it shifts the burden of proof to the taxpayer.

New Jersey has a statute similar to Ohio's which reads, "... shall, in the absence of proof to the contrary, be deemed to have been made in contemplation of death...." N.J.S.A. 54:34-1. In considering a case in which the transfer had been made more than two years prior to death, the New Jersey Equity Court stated, "Where the gift is made less than two years prior to the donor's death, the statutory presumption... arises upon proof by the state that the transfer was a gift and was of a material part of the donor's estate, and this casts upon the taxpayer the duty of going forward with evidence to rebut the presumption; but of course in every case, the burden of proof is upon the state, on the whole case." *Cairns v. Martin,* 130 N.J. Eq. 313, 22 A. 2d 415 (1941).

It is appreciated that were the court to have held otherwise in the instant case a heavy burden would have been placed upon the state in proving in all such cases, by a preponderance of the evidence, that the gift had been made in contemplation of death; the taxpayer confessedly being in a better position to establish the donor's motive in making the gift. In so holding, the court has removed what might otherwise be an unreasonable burden in an important and essential area of state authority.

Richard C. Pickett