The Constitutionality of Legislation Remitting Penalties on Delinquent Taxes

In February 1937 the Whittemore Act[1] was passed. It provided in substance that upon payment of back taxes in full, or upon an undertaking to pay back taxes in ten equal annual installments, both of these elections to be made before a certain date, that back penalties and interest were to be remitted.

Later in 1937 after the Whittemore Act had gone into effect, an act was passed amending Ohio General Code 2590-1 to read as follows: "Whenever any penalty, interest or other charge for non-payment when due of any real estate tax and/or assessment is paid by any person, firm or corporation charged with or legally authorized to pay same, which said penalty, interest or other charge after such payment is or has been remitted or abrogated, conditionally or otherwise, any such penalty, interest or other charge paid since the 20th day of June, 1930 and prior to Jan. 1st, 1937, is hereby expressly remitted or abrogated, on application to the county auditor by such person, firm or corporation on or before the first day of January, 1940, such penalty, interest and charges so paid shall be refunded to such person, firm or corporation on the order of the county auditor directed to the county treasurer."

The probable reason for passing Section 2590-1 was the fear that the Whittemore Act, standing alone was unconstitutional. In 1937, the case of *State ex rel.* v. *Hunt*[2] was decided by the Ohio Supreme Court. Here the Intangible tax act gave the Tax Commission of Ohio power to issue a certificate of immunity from collection of omitted taxes for the years 1926 to 1930 inclusive, upon condition that the taxpayer fully comply with the personal property tax law in 1932. This law was held to be unconstitutional on the ground that it conferred special benefits upon delinquent taxpayers, which is prohibited by Sec. 2, Art. I, of the Ohio constitution. This case is in accord with the majority rule which is stated in 99 A.L.R. 1068 as follows, "In the majority of jurisdictions in which the question has been raised, it seems that the remission, release, or compromise of a valid claim for taxes, authorized by the legislature, violates some constitutional provision."[3] In the

[1] Pages Ohio Cumulative Code Service Number 21; 1937, p. 366, appendix F, subsection 4; amended substitute Senate Bill No. 87.

[2] 132 Ohio St. 568, 24 Abs. 350 (1937).

[3] *Wilson* v. *Sutter County*, 47 Cal. 91 (1873); *New Orleans* v. *Lafayette Insc. Co.*, 28 La. Ann. 756 (1876); *Louisiana Cotton Mfg. Co.* v. *New Orleans*, 31 La. Ann. 440 (1879). *Thompson* v. *Auditor Gen.*, 261 Mich. 624, 247 N.W. 360 (1933). *Falls Ship Coal Co.* v. *Auditor Gen.*, 7 Mich. 84 (1859). *Life Association of America* v. *Board of Assessors*, 49 Mo. 512 (1872); *State* v. *Hannibal & St. J. R. Co.*, 75 Mo. 208 (1881);

Whittemore Act, however, it is penalties on delinquent taxes rather than the taxes themselves that are sought to be remitted. Some courts hold such statutes constitutional[4] while others say such statutes are unconstitutional.[5]

It would seem that Ohio could go either way on this proposition. It is largely a matter of balancing the policy of allowing the state to do what it thinks will be most effective in collecting delinquent taxes, as against that of being fair to delinquent taxpayers who have already paid the penalties. The legislature thought that by passing Section 2590-1, the latter objection would be removed.

However, if the Whittemore Act was unconstitutional when it was passed, could it be validated by a later statute? Several theories have been advanced as to the effect of an unconstitutional statute. One theory is that such a statute is void *ab initio*. A typical statement is that of Justice Field in *Norton* v. *Shelby County*:[6] "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as though it had never been passed." This theory seems to be the traditional theory of the American courts.[7]

In the instant case if this view was taken and the Whittemore act was unconstitutional when passed, it would be void and the fact that Section 2590-1 was later passed would be of no effect.

On the other hand, if Section 2590-1 had been an amending act, and as such showed an intent to reaffirm the Whittemore act as of the

Tubbs v. *Tioga Co.*, 16 Pa. Dist App. 318, 32 Pa. Co. Ct. 504 (1906). *Files* v. *State*, 48 Ark. 529, 3 S.W. 817 (1886); *In re Stanford*, 126 Cal. 112, 58 Pac. 462, 45 L.R.A. 788 (1889). *Ranger Realty Co.* v. *Miller*, 102 Fla. 378, 136 So. 546 (1931); *State ex rel. Maxwell Hunter* v. *O'Quinn*, 114 Fla. 222, 154 So. 166 (1934). *Dubuque* v. *Illinois C. R. Co.*, 39 Iowa 56 (874); *Louisville* v. *Louisville R. Co.*, 111 Ky. 1, 63 S.W. 14, 98 Am. St. Rep. 387 (1901); *State ex rel. Matterson* v. *Luecke*, 194 Minn. 246, 260 N.W. 206, 99 A.L.R. 1053 (1935). *Graham Paper Co.* v. *Gehner*, 332 Mo. 155, 59 S.W. (2d) 48 (1933); *Sanderson* v. *Bateman*, 78 Mont. 235, 253 Pac. 1100 (1927). *State* v. *Pioneer Oil & Ref. Co.*, 292 S.W. 869 (Tex. 1927). *Nathan* v. *Spokane County*, 35 Wash. 26, 76 P. 521, 65 L.R.A. 336, 102 Am. St. R. 888 (1904); *State ex rel. Jones* v. *Graham*, 17 Neb. 43, 22 N.W. 114 (1885); *Lancaster County* v. *Trimble*, 33 Neb. 121, 49 N.W. 938 (1891).

Cases *contra*—*Mobile & G. R. Co.* v. *Peebles*, 47 Ala. 317 (1872); *Ill. C. R. Co.* v. *McLean County*, 17 Ill. 291 (1855); *Hunsaker* v. *Wright*, 30 Ill. 146 (1863); *McDonough County* v. *Campbell*, 42 Ill. 490 (1867); *Apokaa Sugar Co.* v. *Wilder*, 21 Hawaii 571 (1913; *State* v. *State Inv. Co.*, 30 N.M. 491, 239 P. 741 (1925); *Demoville* v. *Davidson County*, 87 Tenn. 214, 10 S.W. 353 (1889); *Garrott* v. *Buckner*, 5 Ky. L. Rep. 56 (1883).

[4] *Jones* v. *Williams*, 121 Tex. 94, 45 S.W. (2d) 130, 79 A.L.R. 983 (1931); *Beecher* v. *The Board of Supervision of Webster County*, 50 Iowa 538 (1879); *Livesay* v. *DeArmond*, 131 Ore. 563, 284 Pac. 166, 68 A.L.R. (1930); *State* v. *Coos County*, 115 Ore. 300, 237 Pac. 678 (1925).

[5] *Sanderson* v. *Bateman*, 78 Mon. 235, 253 Pac. 1100 (1927); *State* v. *Cal. M. Co.*, 15 Nev. 234 (1880); *State* v. *Con V. M. Co.*, 16 Nev. 432 (1882).

[6] 118 U.S. 425 (1886), 30 L.Ed. 178, 6 S.Ct. 1121.

[7] Field, "The Effect of An Unconstitutional Statute," p. 2.

date of the amending act, then the two acts could be read together as if both had been passed at the same time.

Section 2590-1 cannot be said to be an express amendment because of Sec. 16, Art. II of the Ohio Constitution, which provides, " * * * and no law shall be revived, or amended unless the new act contains the entire act revived, or the section or sections amended * * * ." Section 2590-1 does not mention the Whittemore act, much less re-enacting it *verbatim.*

It might be argued that the Whittemore act was revived by implication. The theory would be that Section 2590-1 although it does not refer to the Whittemore act was passed with the intent of making the Whittemore act constituional. However, no auhority can be found that holds an unconstitutional act can be amended or revived without any reference to such act. In view of this, the above position seems untenable.

Therefore, if the Whittemore act was invalid when passed, and the void *ab initio* theory is applied, it will remain unconstitutional in spite of the passage of Section 2590-1.

Another theory as to the effect of an unconstitutional statute, is that such statutes are neither wholly valid or wholly invalid. The courts start with the notion that the judicial function is that of deciding specific controversies between contestants. They do not declare a law unconstitutional and void, but merely refuse to enforce it in the specific case at hand.[8]

If the passage of Section 2590-1 be regarded as changing the fact situation, it is possible to argue under the above theory that the Whittemore act, after the passage of Section 2590-1, was constitutional. However it is very doubtful that a statute would be regarded as a fact within the meaning of the above concept.

If either of these concepts could be applied here, it is believed that the one to be chosen should be the one which will achieve the most desirable result in the situation. Here, the constitutional objection has been removed, and the delinquent taxpayers who have already paid the penalties can recover them. To apply the void *ab initio* doctrine would be unreasonable in this situation, and it seems that the more realistic approach would be to apply the other concept.

Is Section 2590-1 unconstitutional because it is retroactive?

[8] *Wellington et al Petitioners,* 16 Pick. 87 (Mass., 1834). *Dahnke-Walker* v. *Bondurant,* 257 U.S. 282 66 L.Ed. 239, 42 S.Ct. 106, (1921); *Yazoo & Miss. R. R. Co.* v. *Jackson Vinegar Co.,* 226 U.S. 217, 57 L.Ed. 120, 33 SCt. 40 (1912). *Jeffrey Mfg. Co.* v. *Blagg,* 235 U.S. 571, 59 L.Ed. 364, 35 S.Ct. 167 (1914); *Rutten* v. *Paterson,* 73 N.J.L. 467 (1906); *Harlee & Pressley* v. *Ward,* 15 Rich (S.C.) 231 (1868); *State* v. *Bevins,* 230 N.W. 865, 210 Ia. 1031 (1936). *Shepherd* v. *City of Wheeling,* 4 S.E. 635, 30 W.Va. 479 (1887).

Sec. 28, Art. II of the Ohio Constitution provides, "The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may by general laws authorize courts to carry into effect, upon such terms as may be just and equitable, the manifest intention of parties, and officers by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this State."

Justice Story defined retrospective legislation as follows, "Upon principle, every statute which takes away or impairs vested rights, acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

There was and is a feeling that such laws, giving an effect to a man's acts which he could not possible foresee, and therefore make allowance for, were unfair. This feeling no doubt prompted the adoption of this section of the Ohio constitution. However the feeling against the unjustness of this type of legislation has no very strong basis when carefully analyzed. All judicial decisions changing or making law operate retrospectively and yet there is no such feeling against the unjustness of judicial decisions on this ground. Also, although theoretically people act with full knowledge of the legal consequences, yet obviously as a practical matter this is not true.

How have the courts interpreted this section of the Ohio constitution? In spite of the broad and all inclusive language of the provision the courts have read in certain exceptions. The constitution itself provides for an exception in the case of curative acts, and this exception is generally accepted by the courts.[9] However, the courts have said this provision does not include remedial legislation. Another exception recognized by the courts, is that of retroactive legislation which recognizes a moral obligation.

What have the courts meant by remedial legislation? It seems that what the courts have in mind are purely procedural statutes.[10] There is a feeling that a man is not harmed by changing the means to be used in enforcing his substantive rights, so long as the means are not entirely

[9] *Goshorn* v. *Purcell*, 11 Ohio St. 641 (1860). *Burgett* v. *Norris, Treasurer*, 25 Ohio St. 309 (1874). *Miller & Swan* v. *Graham & Smith*, 17 Ohio St. 1 (1866).

[10] *Railroad* v. *Comm'rs.*, 31 Ohio St. 338 (1877); *Railroad* v. *Com'rs.*, 35 Ohio St. 1 (1878); *Seeley* v. *Thomas*, 31 Ohio St. 301 (1877); *Peters* v. *McWilliams*, 36 Ohio St. 155 (1880); *Westerman* v. *Westerman*, 25 Ohio St. 500 (1874); *John* v. *Bridgman*, 27 Ohio St. 22 (1875); *Trustees of Greene Twp.* v. *Campbell*, 16 Ohio St. 11 (1864). *State ex rel. Anderson* v. *Harris*, 17 Ohio St. 608 (1867); *Templeton* v. *Kraner*, 29 Ohio St. 554 (1874); *Rairden* v. *Holden Adm'r.*, 15 Ohio St. 207 (1864); *Gager* v. *Prout*, 48 Ohio St. 89 (1891); *Sturges* v. *Carster*, 114 U.S. 511, 5 S.Ct. 1014, 29 L.Ed. 240 (1884).

taken away. Of course, as was pointed out by Justice Holmes, a legal right must be legally enforceable, or it is not a legal right, but a moral right.[11]

In some situations the courts feel that even changing procedure retroactively is unfair, and places too great a burden on the party seeking to enforce the substantive right. In such a situation the court will say the statute is not within the exception, and hold it unconstitutional.[12] Obviously section 2590-1 does not fall under this exception, as it creates a new substantive right.

The last exception is that of a moral obligation which the legislature may recognize by retroactive legislation. What is meant by this exception? Statutes passed for the following purposes have been held to fall within the exception: To pay bonds issued under an unconstitutional statute,[13] to reimburse a man for collecting taxes where the county was legally unable to do so,[14] state made liable for money paid out by the counties to collect taxes,[15] act for refunding assessments,[16] to reimburse an individual for an injury inflicted by the state,[17] bounties to be given to veteran soldiers who had received none,[18] statute exonerating public officers for money lost without fault,[19] sureties released from liability for school funds,[20] adopting city ordinance void when passed,[21] refunding money paid, and property charged under an improper assessment.[22]

On the other hand, the following statutes were held not to fall within the exception and were therefore unconstitutional: Act refunding taxes erroneously paid,[23] act for refunding of liquor taxes, in case of forced discontinuance,[24] act to pay off bonds issued under an unconstitutional statute,[25] act to pay unfounded claim,[26] act authorizing one school district to reimburse another for certain taxes.[27]

[11] Holmes, "Collected Legal Papers 1921," at Page 168.

[12] *Hill* v. *Railway*, 20 O.C.C. (N.S.) 236, 31 C.D. 282 (1912). *Gompf* v. *Wolfinger*, 67 Ohio St. 144, 65 N.E. 878 (1902). *Cincinnati* v. *Bachman*, 51 Ohio App. 108 19 Ohio Abs. 389 (1935). *New York Life Ins. Co.* v. *Board of Com'rs.*, 99 Fed. 846 (1900). *State* v. *Tin & Japan Co.*, 66 Ohio St. 182, 64 N.E. 68 (1902). *Magruder* v. *Esmay*, 35 Ohio St. 221 (1878).

[13] *N. Y. Life Ins. Co.* v. *Board of Com'rs.*, 106 Fed. 123 (1901).

[14] *State ex rel.* v. *Gibson, Treasurer*, 2 O.N.R. (N.S.) 221, 15 O.D. 73 (1904).

[15] *State ex rel.* v. *Cappeller*, 39 Ohio St. 207 (1883).

[16] *Warder* v. *Com'rs.*, 38 Ohio St. 639 (1883).

[17] *Spitzig* v. *State ex rel. Hile*, 119 Ohio St. 117, 162 N.E. 394 (1928).

[18] *State ex rel. Bates* v. *Richland Twp.*, 20 Ohio St. 362 (1870).

[19] *Board of Education* v. *McLandsborough*, 36 Ohio St. 227 (1880).

[20] *State* v. *Board of Education*, 38 Ohio St. 3 (1882).

[21] *Kumler* v. *Silsbee*, 38 Ohio St. 445.

[22] *State ex rel.* v. *Hoffman*, 35 Ohio St. 435 (1880).

[23] *Comr's.* v. *Rosche Bros.*, 50 Ohio St. 103, 33 N.E. 408 (1893).

[24] Application of James Boyle, etc., 14 O.N.P. (N.S.) 257, 23 O.D. 365 (1913).

[25] *N. Y. Life Ins. Co.* v. *Board of Com'rs.*, 99 Fed. 846 (1900).

[26] *Board of Education* v. *State*, 51 Ohio St. 531, 38 N.E. 614 (1894).

[27] *State ex rel. Board of Education of Macedonia* v. *Board of Education of Northfield Twp.*, 22 O.C.C. 224, 12 C.D. 423 (1901).

As will be seen from the foregoing cases the meaning of this exception is very vague. In effect it is little more than a rationalization to be used in cases where the judges have already reached a conclusion as a result of intuitive feelings of what is just.

To recapitulate: The Ohio constitution forbids retroactive legislation with the exception of curative statutes, yet the courts have purported to read into this broad prohibition two exceptions, remedial legislation, and that recognizing a moral obligation.

By remedial legislation the courts apparently have in mind the machinery of enforcing substantive rights. This exception is not followed consistently, however, and in cases where retroactive remedial legislation is felt by the court to put too heavy a burden upon one of the parties, the court will say such legislation is retroactive and unconstitutional.

The second exception of a moral obligation is very nebulous and seems to be used largely to justify not holding retroactive legislation unconstitutional because the law accomplishes what seems to the court to be a desirable end.

Looking at the field as a whole, it would seem to be safe to say, that outside of curative statutes there are no definite exceptions, but that the courts in many instances will hold retroactive statutes constitutional, and rationalize by saying they fall under the exceptions to the general rule. These exceptions when carefully analyzed will be found to mean nothing more than that the court felt the particular statute to be just and desirable under the circumstances.

There is probably some basis for this feeling against retroactive legislation, though when the cases are carefully examined, and this prejudice is tested in concrete fact situations it is discovered to be unfounded in many situations. Frequently such legislation does achieve desirable and just results. The courts when confronted with this situation usually hold such legislation valid and rationalize upon the above mentioned grounds. It is here that the courts run into difficulties. This is particularly so in a state such as Ohio where there is a specific constitutional provision against retroactive legislation. It is not the fact that they hold such retroactive legislation valid that is objected to, but that their purported reasons are not the real reasons for holding it valid. These apparently definite legal standards may serve to satisfy the judges that they are deciding the cases on the basis of legal rules and logic, and thus not deciding upon the wisdom of the legislation. Yet they are of no use for predicting what the courts are going to do in the future. It would seem to be more helpful if the judges would recognize that the standards they purport to lay down are meaningless, and that these

standards are not used to decide cases. Due to this the present state of the law in the field of retroactive legislation is one of confusion. If the courts would concede that they are not deciding cases upon the grounds they purport to in their decisions, it would clear away much of the uncertainty and confusion. It is submitted that most of this feeling on the part of judges that they must lay down these illusory standards is due to the basic concept in our jurisprudence that judges do not decide upon the policy or desirability of legislation, but merely apply the existing law. They merely see whether the statute is legally consistent with the constitution, and do not allow their personal feelings as to the desirability of such legislation to enter into the question. Of course, this is not true in many situations.

It would seem to be desirable if the courts in this situation would give their real reasons for holding the law constitutional or unconstitutional rather than clinging to this elaborate system of make believe.

In the case under consideration the legislature provided a system of penalties to make certain that taxes would be promptly paid. As they saw the situation at the time such legislation was passed it seemed to be the best way to enforce the regular and punctual payment of taxes. They did not foresee the depression, and if they did they probably would not have foreseen its effect. However the depression did come and many people were unable to pay their taxes, and so the incentive of penalties for delinquency did not have the anticipated result.

In order to remedy this situation, and get past due taxes in, the legislature provided in the Whittemore Act for the remittance of penalties if people would pay their delinquent taxes or agree to pay them in ten annual installments.

Section 2590-1 was passed to obviate what the legislature felt was a possible constitutional weakness in the Whittemore Act. However as we have seen, it may or may not have been necessary constitutionally, and if necessary it probably does not remedy the defect.

However, merely standing by itself it would seem a just measure, but against this feeling must be balanced the effect this act will have upon the treasuries of the counties, etc. If the effect will be too disastrous, it probably would be better to hold the act unconstitutional.

It might be objected that this act denies equal protection because it discriminates against those who have paid their penalties before 1930. However it seems that the court could take judicial notice of the fact that the period of 1930 to 1936 was one of financial stress and in view of these facts, it seems that this period of time was a reasonable basis of classification.

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