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Constitutional Law

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PROCEDURE: STATUTE OF LIMITATIONS: BORROWING STATUTE

With certain exceptions not relevant here, matters concerning the statute of limitations are procedural and therefore governed by the law of the forum.[11] Most, if not all, states have borrowing statutes, the general purpose of which is to bar an action in the forum state if it is barred by the state where the cause of action arose. Ohio has such a statute.[12] Most, if not all, states also have tolling statutes, by which the statute of limitations stops running during the absence of the defendant from the state. In *Palmieri v. Ahart*,[13] the cause of action arose in West Virginia, which had a one-year statute of limitations as opposed to Ohio's two-year statute. However, some months after the accrual of the cause of action, the defendant moved from West Virginia to Ohio, which, by the West Virginia tolling statute, stopped the running of the West Virginia statute of limitations. More than one year but less than two years after the cause of action arose, plaintiff brought suit in Ohio. The court held that the action was barred by the one-year West Virginia statute despite the fact that under West Virginia law it was not barred because the tolling statute stopped the running of the one-year limitation. The court took the position that a borrowing statute is intended to borrow only the time limitation of the other state's statute, not its tolling provisions. The court said that this is the universal rule. As a matter of fact, the general rule appears to be exactly the opposite.[14] However, the Ohio cases cited in the opinion justify the court's decision based on Ohio law. Moreover, the present wording of the Ohio statute differs from that of almost every other statute. But apparently this difference in wording, which is a change from the original statute, was inadvertent.[15]

FLETCHER R. ANDREWS

CONSTITUTIONAL LAW

Judicial review of constitutional issues is a unique contribution to jurisprudence made by the American legal system. This power exercised by the courts is awesome. Two cases in 1960 remind one that in interpreting the law on constitutional issues the judiciary must not "change

11. See RESTATEMENT, CONFLICT OF LAWS §§ 603, 604 (1934).

12. OHIO REV. CODE § 2305.20.

13. 111 Ohio App. 195, 167 N.E.2d 353 (1960). See also discussion in *Civil Procedure* section, p. 457 *supra.*

14. Nordstrom, *Ohio's Borrowing Statute of Limitations — A Quaking Quagmire in a Dismal Swamp,* 16 OHIO ST. L.J. 183, 203 (1955); Annot., 149 A.L.R. 1224, 1231 (1944); Annot., 75 A.L.R. 203, 228 (1931).

15. Nordstrom, *Ohio's Borrowing Statute of Limitations — A Quaking Quagmire in a Dismal Swamp,* 16 OHIO ST. L.J. 183, 192-93 (1955); Annot., 21 Ohio Op. 107 (1941).

the statutes to conform to what the courts consider a better rule. This would be judicial legislation . . . . It isn't the province of any court to say what the law should be; it is its duty to try to determine what the law is."[1] Furthermore, when it comes to executive enforcement of laws, the Ohio Supreme Court stated: "[I]n the determination of the constitutionality of an ordinance or statute, a court must, of course, indulge in the absolute presumption that such ordinance or statute is in fact strictly enforced."[2]

TAKING PROPERTY WITHOUT DUE PROCESS OF LAW

The substantive due process issue of unconstitutionally depriving a person of his property was most prevalent last year. Primarily zoning cases were involved. This fact is understandable. Land in Ohio is becoming of much greater value with population growth, industrial expansion and commercial development. Property law today involves basically the *use* of land. Legal issues in the traditional property field, *e.g.,* fee simple absolutes, springing uses and life tenancies, have been replaced in the courts with issues involving residential uses, nonconforming uses and building permit issuances.[3]

The Ohio Supreme Court last year considered for a second time the case of *Curtiss v. City of Cleveland.*[4] In that case, the municipality had amended its zoning ordinance. Property which had originally been zoned for retail business and had been valued at $100 to $200 per front foot was rezoned to make such use nonconforming. Further, the enlargement of such nonconforming use was restricted and its elimination provided for under certain circumstances. The value of the land then became $20 to $85 per front foot. A majority of the court reaffirmed its prior rule in the earlier *Curtiss* case, holding that such amendments are not in violation of the due process clause where the legislation bears a real and substantial relation to public health, safety, morals or general welfare. In balancing this relationship the court now appears to consider (1) whether the financial loss to the landowner is great, and (2) whether a substantial part of the property has been used for uses other than those permitted by the zoning amendment. As an unconsti-

1. State *ex rel.* Ebersole v. Hurst, 165 N.E.2d 235, 236 (Ohio Ct. App. 1960) (holding that despite legislative incongruities, the civil service seniority rules required seniority credit for a fireman on promotion examination grade for municipal service of 12½ years outside fire department).

2. Wilson v. City of Cincinnati, 171 Ohio St. 104, 108, 168 N.E.2d 147, 150 (1960) (holding any person whose legal relations are affected by a municipal ordinance may have the validity of the ordinance determined and obtain a declaration of his legal relations).

3. To reflect this basic shift of emphasis in Property Law, Western Reserve University Law School in the next year will introduce a new course in LAND USE PLANNING.

4. 170 Ohio St. 127, 163 N.E.2d 682 (1959). For prior case see Curtiss v. City of Cleveland, 166 Ohio St. 509, 144 N.E.2d 177 (1957).

tutional taking of property had occurred, the requested injunctive relief against the zoning amendment was upheld.

The dissenting judge in this second *Curtiss* case contended that the decision rested solely on the record compiled for the first case without any new evidence being presented to the lower court, and since the first *Curtiss* case had been remanded for additional evidence, he felt that the decision in that case should be left undisturbed. The dissent also observed that no standards were set in the majority opinion by which the public benefit could be weighed against the financial loss to the landowner. Finally, the dissent contended that the zoning ordinance itself provided a method for relief in individual cases like these as well as a method to extend nonconforming uses on reasonable terms. No new evidence existed to justify any injunctive relief, so the zoning amendment should have been upheld.

This year the Ohio Supreme Court also held that a zoning ordinance in effect at the time of an application for a building permit determines the right to the permit. An attempt to apply a zoning amendment passed after the permit application but before the permit issuance would be an unconstitutional deprivation of property.[5]

A denial of a change in use to permit a retail gasoline station from locating at the corner of a busy thoroughfare, which already had three such stations within a half mile radius, on the ground of traffic congestion, was held to be an invalid taking of property.[6] Another zoning change was also held to be a violation of due process.[7] To prevent future industrial traffic through a residential area, a reclassification from light industrial to residential was made. The area was already one-third industrial. The landowner had been offered $9000 under the prior classification, but after the change the property became practically worthless because of its isolated position. The court again emphasized that public authorities have no right to adopt zoning changes to regulate traffic.

A series of other property deprivation cases involved matters other than land. Where a vendor under the retail sales tax rules fails to keep adequate records, the Tax Commissioner can refuse the tax return, make test checks of the taxpayer's business for representative periods, collect other sales information and determine the proportion of taxable retail sales to all retail sales without violating the due process protection.[8]

5. Gibson v. City of Oberlin, 171 Ohio St. 1, 167 N.E.2d 651 (1960). See also discussion in *Municipal Corporations* section, p. 539 *infra.*

6. State *ex rel.* Husted v. Woodmansee, 169 N.E.2d 655 (Ohio Ct. App. 1960). See also discussion in *Municipal Corporations* section, p. 541 *infra.*

7. Brockman v. Morr, 168 N.E.2d 892 (Ohio Ct. App. 1960).

8. S. S. Kresge Co. v. Bowers, 170 Ohio St. 405, 166 N.E.2d 139 (1960). See also discussion in *Administrative Law and Procedure* section, p. 441 *supra.*

However, for a municipality to require property owners to construct or repair driveway entrances with concrete when blacktop in reasonably good condition had been in existence for a number of years was held to be an unconstitutional deprivation of property.[9] Likewise, a city ordinance which permitted confiscation of an automobile unlawfully used as a taxicab without providing a hearing in which an innocent auto owner could establish he had not given his permission for such use was another invalid taking under the due process clause.[10]

The state's power to tax the pari-mutual betting at race tracks and to use the revenue derived for state, county and independent fairs appears to be as absolute as the power to confiscate, without running afoul of the due process clause. Race track owners had no standing to sue to test the 1959 Horse Race Act[11] which increased the tax. In *Cleveland Raceways Incorporated v. Bowers*,[12] the court observed that the privileges and immunities clause of the Fourteenth Amendment of the United States Constitution was not violated by such action, for the privileges and immunities protected by this amendment were those owing their existence to the federal government, its national character, constitution or laws.

OBSCENITY AND THE FREE PRESS

Obscenity, as a legal issue, continued to challenge the Ohio judiciary in 1960. The experience of previous years was repeated;[13] however, this year the areas of controversy differed. What is obscene — the problem of definition — apparently is no longer significant. The test pronounced by the United States Supreme Court in *Roth v. United States*[14] is operating well. Certain procedural issues, however, which involve law enforcement against obscene literature, did result in major decisions last year. In one case, *State v. Mapp*,[15] police officers entered a citizen's house without a search warrant and seized obscene materials without offensive physical force. The prosecution proceeded under Ohio Revised Code section 2905.34. The defendant had rented a room in her home to a boarder. Upon the boarder's departure she found obscene books

9. Stueve v. City of Cincinnati, 168 N.E.2d 574 (Ohio Ct. App. 1960).

10. Lindsay v. City of Cincinnati, 168 N.E.2d 597 (Ohio Ct. App. 1960).

11. OHIO REV. CODE § 3769.081 (Supp. 1960).

12. 163 N.E.2d 73 (Ohio C.P. 1958).

13. Schroeder, *Constitutional Law, Survey of Ohio Law — 1959*, 11 WEST RES. L. REV. 356 (1960).

14. 354 U.S. 476 (1957): whether to the average adult person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest.

15. 170 Ohio St. 427, 166 N.E.2d 387 (1960). See also discussion in *Evidence* section, p. 520 *infra* and in *Criminal Law and Procedure* section, p. 488 *infra*.

and pictures in the room. After packing all the boarder's belongings, defendant stored the goods until the boarder would come for them. A majority of the supreme court believed the Ohio statute to be unconstitutional. They felt that prosecution for the mere knowing possession, innocently acquired, with no intention of again looking at the obscene materials, violated the liberty protection of the fourteenth amendment. However, since the court of appeals had upheld the statute's constitutionality, under the Ohio Constitution article 4 section 2 at least six supreme court judges must concur in order to hold the statute unconstitutional and therefore, the court of appeals decision had to be upheld. A vigorous dissent by two judges objected to the conviction on the ground that the evidence had been illegally seized and called for the modification and clarification of *State v. Lindway*,[16] which approved the use of illegally seized evidence in criminal trials.

With the validity of the Ohio obscenity law resting on such a questionable ground after the *Mapp* case, the Cincinnati Municipal Court deftly handled an obscenity case prosecuted under the city ordinance.[17] The court acknowledged that a municipal ordinance cannot make a certain course of conduct a misdemeanor if a general statutory enactment makes the identical offense a felony.[18] However, the court concluded that no valid state obscenity statute existed as the Ohio Revised Code section 2905.34 was modified by section 3767.01. This modification made section 2905.34 unconstitutional for section 3767.01 provided that no prosecution could proceed under section 2905.34 against literature which had been granted a second class mail permit. This delegation of authority to the federal postal authorities to determine what was obscene under Ohio law was said to be an illegal and an unreasonable classification favoring the second class mail permit literature. On this analysis section 2905.34 was invalid, and therefore, no state felony existed and conviction of defendant under the city ordinance was constitutional if the *Roth* test be proved, which it was.

The new injunctive procedure against obscene literature provided by a 1959 amendment in Ohio Revised Code section 2904.343 was also held constitutional last year.[19] Patterned after the New York law which the United States Supreme Court upheld as constitutional,[20] this section permits an injunction after an equity trial to determine the obscenity

16. 131 Ohio St. 166, 2 N.E.2d 490 (1936). See also discussion in *Evidence* section, p. 520 *infra.*

17. City of Cincinnati v. King, 168 N.E.2d 633 (Ohio Munic. Ct. 1960). See also discussion in *Criminal Law and Procedure* section, p. 489 *infra.*

18. City of Cleveland v. Betts, 168 Ohio St. 386, 154 N.E.2d 917 (1958). See discussion in *Municipal Corporations* section, p. 537 *infra.*

19. State *ex rel.* Beil v. Mahoning Valley Distrib. Agency, 169 N.E.2d 48 (Ohio C.P. 1960).

20. Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957).

issue. If the literature be obscene, its destruction is ordered. No jury trial is given since no imprisonment is provided. No prior restraint or censorship occurs for the literature is tested only after it is published. The degree of proof set by the court in such obscenity cases is that the evidence must be clear, convincing and unequivocal. The test of obscenity was the *Roth* test. Upon this basis the book *Sex Life of A Cop* was held to be obscene, and was ordered seized and destroyed in Mahoning County.

UNLAWFUL DELEGATION OF AUTHORITY

The Ohio courts affirmed the validity of certain acts of the Director of Highways commented upon in last year's survey.[21] The Director can conduct work on a federal aid highway without the consent of the municipality and it is not an improper delegation nor a violation of municipal self-government.[22] Nor did an unconstitutional delegation of legislative powers exist when the Turnpike Commission was authorized to adopt rules for traffic regulation. The Commission had set a speed limit of sixty-five miles per hour on the turnpike. Conviction of defendant for violation of this rule was held constitutional.[23] The Director of Highway Safety can also be constitutionally delegated the authority to promulgate rules relative to driver training schools, including a rule prohibiting a driver's license examination in a dual control car. The regulations are based upon the public safety or welfare of driver training students, which is the expressed legislative policy.[24]

That hardy perennial of economic regulation, the Fair Trade Law, was held invalid last year.[25] It was described as an invalid delegation to private persons as well as an unconstitutional exercise of the police power totally unrelated to the general welfare, for it was a price-fixing act rather than an act to protect good-will and trade-mark products.

STATE CONSTITUTION PROVISIONS

Several cases in 1960 considered specific problems of the state constitution not generally related to broader constitutional problems such as "due process" or "unlawful delegation."

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21. Schroeder, *Constitutional Law, Survey of Ohio Law — 1959*, 11 WEST. RES. L. REV. 360 (1960).

22. City of Lakewood v. Thormeyer, 171 Ohio St. 135, 168 N.E.2d 289 (1960).

23. State v. Cunningham, 168 N.E.2d 552 (Ohio Ct. App. 1960). See also discussion in *Criminal Law and Procedure* section, pp. 489-90 *infra* and in *Administrative Law and Procedure* section, p. 444 *supra.*

24. In the Matter of Adoption of Rules and Regulations Relative to Driver Training Schools, 165 N.E.2d 834 (Ohio C.P. 1958) interpreting OHIO REV. CODE §§ 4508.01-.03, .99. See also discussion in *Administrative Law and Procedure* section, p. 443 *supra.*

25. Helena Rubenstein, Inc. v. Cincinnati Vitamin & Cosmetic Distrib. Co., 167 N.E.2d 687 (Ohio C.P. 1960). See also discussion in *Trade Regulation* section, p. 580 *infra.*

A county being merely the local agency of the state is protected with sovereign immunity from a tort action of a tenant injured in a building where the county was the landlord and failed to maintain stairway handrails. In the absence of statutory authorization the county cannot be sued.[26]

The recent statute authorizing the Director of Highways to enter an agreement with the School Employees Retirement Board[27] was held constitutional.[28] The Director acts as agent of the Board to acquire land deemed necessary for highways. The Board must purchase the land in the biennium unless the agreement be renewed for periods not exceeding two years with purchase not later than five years from original agreement. No debt would be created within the contemplation of the Ohio Constitution article 8 sections 1, 2(c) and 3.

The last paragraph of Ohio Revised Code section 2301.02 was held unconstitutional. It was in direct conflict with article 4 section 13 of the Ohio Constitution. The statute sought to reduce the number of common pleas judges. It was applied to a judge appointed to a vacancy when he sought to file nominating petitions for the unexpired term election. The constitutional provision authorizes election for the unexpired term and therefore, the statutory reduction when applied to this judge was unconstitutional.[29]

The constitutional right to a grand jury indictment before a felony trial can be waived by the accused when a statute permits such waiver. The criminal proceeding is based on information only to eliminate delay. The 1959 statute so providing was held to be constitutional.[30]

MUNICIPAL CORPORATION POWERS

A city ordinance providing for a $500 fine or up to six months imprisonment for driving while intoxicated was held in conflict with the state statute which provides the same fine and not less than three days nor more than six months imprisonment.[31] The state statute further prohibits a court from suspending the first three days of any sentence. Since the municipal ordinance permits judicial discretion on the imprisonment it is invalid as it contravenes a stricter statute of general applica-

26. Schaffer v. Board of Trustees of the Franklin County Veteran's Memorial, 171 Ohio St. 228, 168 N.E.2d 547 (1960).

27. OHIO REV. CODE § 5501.112.

28. State *ex rel.* Preston v. Ferguson, 170 Ohio St. 450, 166 N.E.2d 365 (1960).

29. State *ex rel.* Gusweiler v. Board of Elections, 170 Ohio St. 273, 164 N.E.2d 407 (1960).

30. State v. Centers, 162 N.E.2d 925 (Ohio C.P. 1959) held the statute unconstitutional. *Ex parte* Stephens, 171 Ohio St. 323, 170 N.E.2d 735 (1960), however, held the waiver statute valid. See also discussion in *Criminal Law and Procedure* section, pp. 491-92 *infra.*

31. OHIO REV. CODE §§ 4511.19, .99.

tion.[32] Also, a municipality could suspend a civil service employee up to thirty days for purposes of discipline without a hearing before the commissioner, or right of appeal to the commission. Employees in classified service do not have a vested right to their employment.[33]

Procedural Due Process

One aspect of the procedural process due a person is an ascertainable standard of conduct before a criminal conviction is constitutional. Two municipalities sought to enforce ordinances prohibiting unlawful congregating on the streets. In one instance the ordinance was deemed too vague for men of common intelligence to guess its meaning.[34] In another the failure to lay down rules or standards for the valid exercise of the police power was held to be arbitrary and unconstitutional.[35]

In *State Tax Commissioner v. Griesmeyer*,[36] the Tax Commissioner filed an assessment for retail sales taxes and the court clerk entered a so-called judgment, issued a certificate of lien, an execution and an aid of execution. The court held that the clerk could not enter such a "judgment," for this is a judicial function; however, he could do the ministerial act of acquiring a lien for the state and enforcing that lien.

Unreasonable Classification

No denial of equal protection occurred when a mutual life insurance company, which had changed from a fraternal benefit society, was required to compute its annual franchise tax including both the premium income of the fraternal benefit certificates and the mutual life insurance. As a fraternal benefit society, the business had tax exempt status.[37]

State ex rel. McElroy v. A. M. Kinney Incorporated[38] held that the amendment prohibiting a corporation from engaging in professional engineering, which is inapplicable to corporations already in existence, does not create an unconstitutional discrimination in favor of such corporations existing at the time of the amendment.

Commerce Clause

So thoroughly has the economic life of America become an interstate activity under federal control that it is an unusual event when a

32. City of Toledo v. Ransom, 169 N.E.2d 657 (Ohio Munic. Ct. 1960).

33. Shok v. City of Cleveland, 168 N.E.2d 170 (Ohio Ct. App. 1960).

34. City of Cleveland v. Baker, 167 N.E.2d 119 (Ohio Ct. App. 1960). See also discussion in *Criminal Law and Procedure* section, p. 490 *infra.*

35. City of Toledo v. Sims, 169 N.E.2d 516 (Ohio Munic. Ct. 1960).

36. 170 N.E.2d 437 (Ohio C.P. 1960).

37. Security Benefit Life Ins. Co. v. Robinson, 170 Ohio St. 217, 163 N.E.2d 352 (1959).

38. 171 Ohio St. 193, 168 N.E.2d 400 (1960). See also discussion in *Corporations* section, p. 479 *infra.*