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### Contracts

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criminal court in any county is a self-executing right of Article IV, section 3 of the constitution; the legislature cannot deprive the judge of this authority.<sup>21</sup> However, the initiative and referendum authority for non-charter cities provided in section 1 of Article II is not self-executing but executory only; the General Assembly can legislate to provide a maximum thirty-day filing period for a referendum petition. A petition filed after the thirty-day period is invalid under the statute.<sup>22</sup>

The unusual Ohio rule on holding a state statute unconstitutional found in Article IV, section 2 —

No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void,

came into operation in 1955. A state appropriation to certain veterans' organizations for the rehabilitation of war veterans and for promotion of patriotism was attacked as violating Art. VIII, section 4 which prohibits the giving or lending of state credit to any individual, association or corporation. The money was released only when a semi-annual expenditure report was filed with the state controlling board. The court of appeals had held this statute constitutional. Two or more of the Supreme Court judges had doubts concerning its unconstitutionality; hence the statute was held valid.<sup>23</sup>

OLIVER SCHROEDER, JR.

## CONTRACTS

### *Retraction of Repudiation of Contract Impossible After Suit by Promisee*

The Court of Common Pleas of Franklin County, in *Gilmore v. American Gas Machine Co.*,<sup>1</sup> held that where a party bound by an executory contract repudiates his obligations before the time for performance, the promisee, so far as further performance is concerned, may treat the contract as ended, and maintain an action at once for damage occasioned by such anticipatory breach and that this rule applies where a repudiation occurs during performance. The court also held that once the promisee has brought suit for the anticipatory breach, an attempt to retract the repudiation is ineffectual.

<sup>21</sup> State v. Powers, 129 N.E.2d 653 (Ohio App. 1954).

<sup>22</sup> Dubyak v. Kovach, 164 Ohio St. 247, 129 N.E.2d 809 (1955).

<sup>23</sup> State *ex rel.* Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 59 (1955).

### Waiver of Condition Precedent in Construction Contract

In *Creith Lumber Co. v. Cummins*<sup>2</sup> a contractor had contracted to furnish the materials and build a house on the land of the contractee. By the terms of the contract the unpaid balance of the contract price was not to become due and payable until there had been issued by a mortgage lender employed by the contractee to finance the building project an approval certificate as to the construction of the house. The contractor substantially performed the contract, and the contractee took possession and occupied the house as his property. Upon the contractee's failure to pay the balance of the contract price, the contractor brought suit against the contractee to recover such balance although the approval certificate called for by the contract had not been issued by the mortgage lender. The common pleas court granted the contractee's motion for dismissal. The court of appeals affirmed the judgment. In reversing the judgment and remanding the case to the trial court, the Supreme Court ruled that although the approval certificate constituted a condition precedent to the maintenance of an action to recover the balance claimed to be due, where the owner of a building built for him under a contract substantially performed accepts and takes possession, knowing or having reason to know that the construction is defective or incomplete, such acceptance will be deemed a waiver of such a condition precedent and the contractor will be entitled to recover the amount due under the contract, less deductions for deficiencies.

### Cost Plus Fixed Fee Contract

The Supreme Court held in *Charles A. Burton, Inc. v. Durkee*,<sup>3</sup> which was an action to recover compensation by a building contractor on a cost plus fixed fee contract, that where the defendant for whom the structure was built asserts a counter claim for compensable damages which he claims to have suffered by reason of malfeasance, extravagance, wastefulness, and negligence on the builder's part, the burden of proof is upon the defendant to establish his claims of damage, and, even though there is a marked disparity between the builder's estimation of the cost and the actual cost of the structure, the builder is not bound to show that the costs were reasonable.

### Employment Contract — Restrictive Covenant

In *Toulmin v. Becker*,<sup>4</sup> an employment contract which provided that the employee could not, in the event of termination of his employment:

<sup>2</sup> 129 N.E.2d 93 (Ohio Com. Pl. 1952).

<sup>3</sup> 163 Ohio St. 264, 126 N.E.2d 323 (1955).

<sup>4</sup> 162 Ohio St. 433, 123 N.E.2d 432 (1954).

<sup>5</sup> 124 N.E.2d 778 (Ohio App. 1954).