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Constitutional Law

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there arose a rebuttable presumption or inference that the truck involved in the accident belonged to the one whose name and markings it carried and also that it was being operated on his business at the time of the collision. The decision is in accord with the *Restatement*.[16]

FLETCHER R. ANDREWS

CONSTITUTIONAL LAW

OBSCENITY LAWS

Obscenity generated judicial opinions in 1956,[1] 1957,[2] and 1958.[3] In 1959, sex again reared its ugly head in Ohio constitutional law decisions. In laymen's language, the law continues to have difficulty with pictures of nude or partially disrobed women in publications, especially when stories of sex acts or crimes accompany these pictures. Reported last year were decisions of cases arising in Cleveland and Cincinnati. In the former city, a druggist was indicted[4] under the Ohio criminal code[5] for knowingly possessing an obscene magazine and for knowingly exhibiting a certain magazine which contained obscene pictures. A demurrer to the indictment was overruled. The court severed the exhibiting count from the possessing count because the former did not meet the United States Supreme Court requirement delineated in *Roth v. United States*[6] — the periodical must be taken as a whole to judge its obscene character. The count based upon knowingly possessing obscene printed matter withstood constitutional objections raised in the areas of due process, free press, inviolability of private property, and equal protection. The last point was urged as a basis for holding druggists exempt from the obscenity provisions.[7] The court held that no such special privilege existed.

A municipal ordinance[8] was involved in the Cincinnati case.[9] The charge was having possession of, or control over, obscene printed matter. Magazines with photographs of nude females, with such accompanying stories as using hypnosis to improve husband-wife sex relations, methods by which a woman can protect herself from sex attacks, and a rape of an expectant mother were placed in evidence. A psychologist testified as an expert on the effect of such material on the average mind; a police officer, with considerable experience in combatting juvenile delinquency and vice, offered evidence of the effect of such publications on young delinquents and sex deviates. The conviction was affirmed because the publication was obscene under the *Roth* test: to the average person, applying contemporary community standards, the dominant theme, taken as a whole, appeals to prurient interests.

16. RESTATEMENT, CONFLICT OF LAWS § 595(2) (1934).

In December 1959, however, the United States Supreme Court appears to have banned convictions under facts such as were present in this Cincinnati case. *Smith v. People of California*[10] reversed a municipal conviction under an ordinance requiring only possession of obscene material for criminal liability. No proof of the bookseller's *scienter* or *"knowingly* possessing" the publication was required by the ordinance. This was held unconstitutional under the provision for liberty of press and speech awarded by the United States Constitution.[11]

The Use Tax and Interstate Commerce

The Ohio Supreme Court was called upon to apply the interstate commerce clause last year. The Ohio use tax[12] was held to be constitutionally applied to radio transmitting equipment purchased out of state, and shipped into Ohio where it was installed within several days to be used principally for interstate transmission. The tax was viewed as being applicable to all personal property which comes to rest in Ohio, without resulting in discrimination or burdening commerce among the states.[13]

Equal Protection and Due Process

Equal protection and due process issues continue to be of concern in litigation. It was held that a city ordinance which taxed water and sewer rental bills fifty per cent for general revenue purposes did not violate the equal protection clause of the fourteenth amendment. However, such an ordinance did violate Ohio statutes,[14] which forbid the transfer of water and sewer funds to the general fund.[15]

The statutes which exclude corporations and new resident owners from signing or opposing an annexation petition were held not to be

1. Schroeder, *Constitutional Law, Survey of Ohio Law — 1956,* 8 West. Res. L. Rev. 275, 278 (1957).
2. Schroeder, *Constitutional Law, Survey of Ohio Law — 1957,* 9 West. Res. L. Rev. 275 (1958).
3. Schroeder, *Constitutional Law, Survey of Ohio Law — 1958,* 10 West. Res. L. Rev. 359 (1959).
4. State v. Kowan, 156 N.E.2d 170 (Ohio C.P. 1958).
5. Ohio Rev. Code §§ 2905.34-.35.
6. 354 U.S. 476 (1957).
7. Ohio Rev. Code § 2905.37.
8. Cincinnati, Ohio, Code § 901-13 (1956).
9. City of Cincinnati v. King, 159 N.E.2d 767 (Ohio Ct. App. 1958).
10. 361 U.S. 147 (1959).
11. *Id.* at 150.
12. Ohio Rev. Code § 5741.02.
13. Tri City Broadcasting Co. v. Bowers, 169 Ohio St. 126, 158 N.E.2d 203 (1959).
14. Ohio Rev. Code §§ 729.52, 743.05-.06.
15. City of Franklin v. Harrison, 160 N.E.2d 15 (Ohio Ct. App. 1959).

a denial of equal protection or due process.[16] Even when the General Assembly enacts two statutes, both labeled section 5519.02, and both appearing in the Ohio Revised Code, the law is not so vague as to violate due process.[17]

Delegation of Legislative Authority

Delegation of legislative authority to administrative officers is constantly an issue in state constitutional cases. Two decisions upheld the validity of state statutes in this area. To grant the Board of Tax Appeals the power to promulgate rules for the assessment of property for tax valuation so as to achieve uniformity, to avoid overevaluation, and to bar discrimination was held constitutional.[18] Furthermore, article XII, section 2 of the Ohio Constitution, providing a maximum tax of one per cent on property, was not violated. The creation by statute[19] of the Toledo-Lucas County Port Authority was also held valid. No illegal delegation occurred, and no tax levy for private purpose, no use of public funds for private purpose, no appropriation of private property for private use, and no lending of public credit for private companies (all prohibited by the state constitution)[20] existed.[21] However, the General Assembly did illegally delegate its authority when it authorized the Division of Parks to make and enforce rules to control water craft on lakes.[22] The rules promulgated prohibited and punished a person who repeatedly changed direction of such a craft without a substantial reduction of speed, except to avoid a hazard. The court held that article II, section 1 implies that criminal legislation must be promulgated by act of the legislature, not by administrative order.[23]

Police Power

The issue of state police power arose in two cases. An ordinance prohibited the practice of peddlers' going onto private property without the owner's invitation, and declared such act to be a nuisance.[24] The state statute permits licensing of transient dealers.[25] However, it was held that it is unconstitutional to forbid such dealers entirely, by ordinance.[26]

16. Chedwell v. Cain, 169 Ohio St. 425, 160 N.E.2d 239 (1959).
17. Thormyer v. Dueber Realty Inc., 158 N.E.2d 924 (Ohio C.P. 1959).
18. Carney v. Board of Tax Appeals, 169 Ohio St. 445, 160 N.E.2d 275 (1959).
19. Ohio Rev. Code ch. 4582.
20. Ohio Const. art. 8, § 6.
21. State *ex rel.* McElroy v. Baren, 169 Ohio St. 439, 160 N.E.2d 10 (1959).
22. Ohio Rev. Code § 1541.11.
23. State v. Pairan, 159 N.E.2d 829 (Ohio C.P. 1958).
24. Washington, Ohio, Ordinance 383, April 13, 1938.
25. Ohio Rev. Code § 715.64.
26. City of Washington v. Thompson, 160 N.E.2d 568 (Ohio C.P. 1959).

A municipal ordinance[27] prohibited a private electric utility from erecting overhead transmission lines to carry over 33,000 volts. The utility sought to use such lines to carry 132,000 volts, as it had done in many other localities. The requirement that such lines be underground was held to be a reasonable exercise of the police power.[28] The three dissenting judges[29] relied upon the rule of an earlier case,[30] that to be a valid exercise, the police power must tend in some substantial degree to prevent offenses or preserve health and safety. If there be no plausible, reasonable, and substantial connection between the legislation and the supposed evils, no authority exists to enact the legislation. The dissent relied heavily on the fact findings of the special master. Automatic cut-offs operated within 1/20th of a second to shut off the 132,000 volts. In the 1953 tornado in Cleveland, none of these 132,000 volt lines were blown down. Thirty years of records indicated no such accident. Only nine times did *any* accidents occur, and they were caused by vandalism and an airplane collision. The only person ever injured was the aviator. These high voltage lines exist at 877 street crossings in other nearby municipalities. To the dissenting judges, undisputed evidence on record revealed no substantial connection between the alleged evil of falling lines and the underground requirement.

Zoning

Land use and zoning are current municipal problems. The Ohio Supreme Court held that mandamus will lie to compel the issuance of a building permit for a supermarket on a parcel of land which had a parcel with similar zoning on one side, but parcels with less restrictive zoning on the other three sides. The court said that to require this parcel to be used in accordance with the more restrictive zoning would prohibit its use in harmony with the needs and nature of the neighborhood. Further, this requirement would be confiscation and a violation of the due process clause.[31] When a municipality gives a permit to operate an automatic laundry store, and it is not classified as a non-conforming use, no vested right exists to operate seven days a week, twenty-four hours a day. No contract, just a special privilege, has been granted. The Sabbath closing law can be enforced.[32]

27. Euclid, Ohio, Ordinance 288-1956, Dec. 3, 1956.

28. State *ex rel.* Cleveland Elec. Illuminating Co. v. City of Euclid, 169 Ohio St. 476, 159 N.E.2d 756 (1959). See also discussion in *Municipal Corporations* section, p. 408 *infra.*

29. *Id.* at 483, 159 N.E.2d at 762 (dissenting opinion).

30. City of Cincinnati v. Correll, 141 Ohio St. 535, 49 N.E.2d 412 (1943).

31. State *ex rel.* Killeen Realty Co. v. City of East Cleveland, 169 Ohio St. 375, 160 N.E.2d 1 (1959). See also discussion in *Administrative Law and Procedure* section, p. 338 *supra.*

32. State *ex rel.* 12501 Superior Corp. v. City of East Cleveland, 158 N.E.2d 565 (Ohio Ct. App. 1959). See also discussion in *Administrative Law and Procedure* section, p. 339 *supra.*

Procedural Due Process

Procedural due process was discussed twice last year. One case held that it would be a violation of due process to deny plaintiff's motion to dismiss a lawsuit without prejudice when defendant had not concluded putting in his evidence and had not rested. Plaintiff, too, had not waived rebuttal and thus had not rested. Under Ohio Revised Code section 2323.05(A), no leave of court is required in this situation and to deviate from the express provisions of trial procedure would be unconstitutional.[33] A dissenting judge[34] contended that the case had already been submitted at the end of plaintiff's case when defendant moved for judgment, so plaintiff must get leave to dismiss without prejudice.

Another case held that a municipality need not be provided a hearing before the state director of highways before he issues a resolution declaring the necessity of relocating a federal aid highway in the city.[35] The legislature provided the procedure to be followed by the administrative officer to determine where to re-route the highway.[36] The municipality has the right to appeal this determination to the court through a trial de novo.[37] This procedure was deemed to satisfy procedural due process. Furthermore, this was not an unlawful delegation of legislative authority, nor did it violate the requirement of uniform operation of general laws.

Other Constitutional Issues

A number of special issues involving Ohio constitutional provisions were reported in 1959. The General Assembly improperly enacted legislation providing for a constitutional amendment to be voted on at the general election. The bill was not timely entered in the journals of the House and Senate, as required by article XVI, section 1 of the Ohio Constitution. Therefore, the Secretary of State was enjoined from advertising the proposed amendment.[38] Two dissenting judges[39] viewed the constitutional clause as not being self-executing and contended that both houses of the assembly had kept true journals under Ohio Revised Code section 101.61, which was a valid enactment.

The Ohio Supreme Court held that mandamus will lie to require the Board of Elections to arrange names on a general election ballot by group, under the office title, as required in article V, section 2(a)

33. Glassmeyer v. Glassmeyer, 155 N.E.2d 702 (Ohio Ct. App. 1959).

34. *Id.* at 706 (dissenting opinion).

35. City of Lakewood v. Thormyer, 154 N.E.2d 777 (Ohio C.P. 1958). See also discussion in *Administrative Law and Procedure* section, p. 330 *supra.*

36. Ohio Rev. Code § 5521.01.

37. City of Lakewood v. Thormyer, 154 N.E.2d 777, 786 (Ohio C.P. 1958).

38. Wichterman v. Brown, 170 Ohio St. 25, 161 N.E.2d 899 (1959).

39. *Id.* at 29, 161 N.E.2d at 903 (dissenting opinion).