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Constitutional Law

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Substance and Procedure: Inferences and Presumptions

It is fundamental that matters of procedure are governed by the law of the forum¹⁵ and that, consequently, the law of the forum governs presumptions and inferences to be drawn from the evidence.¹⁶

The case of *McDougall v. Glenn Cartage Co.*¹⁷ is in accord with this rule. The suit arose from an automobile accident in New York, in which there was no evidence that the driver of the truck was an employee of the defendant, owner of the truck, or that he was within the scope of his employment. The plaintiff contended that proof of ownership of the truck made out a prima facie case under the law of New York and that the law of New York should govern, but the court held that the law of Ohio governs in matters relating to presumptions, which are remedial rather than substantive in nature.¹⁸

FLETCHER R. ANDREWS

CONSTITUTIONAL LAW

Once again last year challenging issues of human liberty confronted the Ohio courts — liberty of the mind and of the body.

Obscenity

In the area of the mind the issue of obscenity presented two cases, both at the common pleas level. A motion picture advocating nudism and exhibiting the naked buttocks and breasts of both sexes, but not the genitalia, was held to violate the statute prohibiting a motion picture exhibition which creates public disorder or from which public disorder is imminent.¹ Also the selling of literature which emphasizes nudity in text and pictures was held to be obscene and punishable. No invasion of the constitutional free press occurred. Furthermore, evidence by a psychologist as an expert witness was held admissible to show that the publications were designed for consumption by sexual perverts. The court accepted the United States Supreme Court's obscenity test ex-

15. RESTATEMENT, CONFLICT OF LAWS § 585 (1934).

16. *Id.* § 595 (2).

17. 79 Ohio L. Abs. 169, 151 N.E.2d 760 (Ohio Ct. App. 1958). See also, AGENCY section, *supra*.

18. This matter of substance and procedure in the field of presumptions is not as simple as "black letter" rules may make it sound. See STUMBERG, CONFLICT OF LAWS 137-141, 156-158 (2d ed. 1951).

pounded in the *Roth*² case: "'Obscene material' is material which deals with sex in a manner appealing to prurient interest" and the standard for judging this obscenity is whether the average person applying contemporary community standards determines that the dominant theme of the material, taken as a whole, appeals to this prurient interest.³

Religious Freedom

Religious issues also arose under the liberty of the mind concept. The thorny issue raised by the Amish parent's refusal to surrender a child to meet the Ohio compulsory school attendance law on the grounds of religious freedom was resolved in the state's favor. Contempt proceedings against the parents were upheld as constitutional — the religious beliefs of one cannot infringe upon the civil rights of others — namely the enforcement of a lawful court order giving custody over the Amish child to the county welfare board.⁴

Under the religious freedom provisions of the Ohio constitution, the judiciary cannot enforce a separation agreement in which the wife promised to rear the child as a Roman Catholic, but refused to do so after receiving custody in the divorce action.⁵

The Supreme Court also upheld the validity of the Sunday closing law for business. It had been attacked as a promulgation of religious observances by the legislature in violation of the Ohio Constitution. A secondary basis for the statute's validity lay in the legislature's constitutional authority to regulate hours of labor for health, safety and general welfare purposes.⁶

Liberty of the Body

Liberty of the body was upheld where during discovery proceedings in a civil action the adverse party was cross examined as to his refusal to take an alcohol test upon a policeman's request. Since every person has the absolute right to refuse to take the test, a person cannot be examined regarding this issue during deposition proceedings.⁷

A citizen with possession of another's automobile as well as the keys

1. State v. Rothschild, 149 N.E.2d 57 (Ohio C.P. 1958).
2. Roth v. United States, 354 U.S. 476 (1957).
3. Cincinnati v. King, 152 N.E.2d 23 (Ohio C.P. 1958).
4. State v. Hershberger, 150 N.E.2d 671 (Ohio Juv. Ct. 1958).
5. Hackett v. Hackett, 150 N.E.2d 431 (Ohio Ct. App. 1958). See discussion under DOMESTIC RELATIONS section, *infra*.
6. State v. Kidd, 167 Ohio St. 521 150 N.E.2d 413 (1958).
7. *Ex parte* Rebersak, 106 Ohio App. 425, 150 N.E.2d 869 (1958). See discussion in EVIDENCE section, *infra*.

and certificate of title cannot be forcibly arrested upon refusal to comply with a policeman's order to return the automobile, keys and certificate to the titleholder who wants his car back. No misdemeanor was committed in the officer's presence so the arrest without a warrant was invalid.⁸

Police Power

As usual, numerous cases involving the invasion of an individual's property rights by the state's police power raised the fourteenth amendment issues of due process and equal protection. Exercise of the state police power was held constitutional in these situations.

The real estate brokers licensing statute permits brokers with experience to acquire licenses. All others must qualify for license by first taking college real estate courses.⁹

Well drillers for hire can also be ordered to file a copy of their well drilling logs with the Division of Water, Ohio Department of Natural Resources.¹⁰

A motor carrier domiciled in Ohio can be required to pay the Ohio highway use tax along with all other Ohio-domiciled carriers even though competitors with Michigan and Indiana domiciles were not required to pay the same tax because of reciprocity agreements then in effect.¹¹

The Board of Liquor Control can be delegated power to fix minimum prices for sale of bottled wine, and violations of the minimum price regulations can be enforced by suspending the liquor permit of a wine wholesaler.¹²

Motor carriers have no right to a mandamus order requiring state officials to enter reciprocity agreements with other states relative to highway use taxes.¹³

A municipality can enact an ordinance to make mere possession of a coin-operated pinball machine a misdemeanor. The amusement device, designed to be readily put to use in gambling, creates a substantial public safety problem to permit its prohibition despite the property protection afforded by the due process clause.¹⁴

8. *Columbus v. Holmes*, 152 N.E.2d 301 (Ohio Ct. App. 1958).

9. *In re Russo*, 150 N.E.2d 327 (Ohio Ct. App. 1958). See also, ADMINISTRATIVE LAW section, *supra*.

10. *State v. Martin*, 168 Ohio St. 37, 151 N.E.2d 7 (1958).

11. *Kaplan Trucking Co. v. Bowers*, 168 Ohio St. 141, 151 N.E.2d 654 (1958).

12. *The Pompei Winery Inc. v. Board of Liquor Control*, 167 Ohio St. 61, 146 N.E.2d 430 (1957). See also ADMINISTRATIVE LAW section, *supra*.

13. *State ex rel. Interstate Motor Freight System v. O'Neill*, 104 Ohio App. 309, 149 N.E.2d 24 (1957).

14. *Benjamin v. City of Columbus*, 167 Ohio St. 103, 146 N.E.2d 854 (1957).

In several other instances, however, the police power was restrained because of violations in the equal protection and due process areas.

An excise tax by a municipality on water and sewer users' bills to provide general fund money indicated no reasonable relation between the difference in water used and a taxpayer's responsibility to support the general fund; hence, the classification was improper and the tax unconstitutional.¹⁵

A property owner was granted a mandamus writ to compel a city to issue a building permit to construct a supermarket on a tract zoned in the front for retail and in the rear for apartments. Refusal to grant a variance was taking of property without due process of law.¹⁶

The Ohio Fair Trade Act, prohibiting persons not parties to a stipulated-price contract from selling trade marked items at a price lower than the manufacturer stipulates, unconstitutionally denies to the owner the due process protection for his property.¹⁷

A township zoning regulation prohibited unnecessary structures, including fences, whose apparent purposes were to annoy or damage the adjacent owner. This regulation was held unconstitutional expressly because of lack of uniformity and improper delegation of legislative authority to an administrative officer or citizen. The implied effect was to protect an individual's property rights, however.¹⁸

Procedural Due Process

Procedural due process issues continually demand judicial interpretation. Last year's reports provided their share. The Supreme Court upheld the new disbarment procedures against a judge for his violation of the Canons of Judicial Ethics which had been made a rule of the Supreme Court prior to the judge's violation. The defending judge had claimed a failure of procedural due process because no guarantee of a Supreme Court hearing was provided in the comprehensive disbarment procedure, although in reality the Supreme Court had granted the erring judge a hearing.¹⁹

The statutory provision that a referee may be appointed "in any case which the parties are not entitled by the constitution to a trial by jury"²⁰

15. *City of Franklin v. Harrison*, 153 N.E.2d 467 (Ohio Munic. Ct. 1957).

16. *State ex rel. Killeen Realty Co. v. City of East Cleveland*, 153 N.E.2d 177 (Ohio Ct. App. 1958), See, 10 WES. RES. L. REV. 307 (1959).

17. *Union Carbide and Carbon Corp. v. Bargain Fair Inc.*, 167 Ohio St. 182, 147 N.E.2d 481 (1958). See also SALES and TRADE REGULATION sections, *infra*.

18. *State v. Zumpano*, 146 N.E.2d 871 (Ohio Ct. App. 1956).

19. *Mahoning County Bar Ass'n. v. Franko*, 168 Ohio St. 17, 151 N.E.2d 17 (1958). See also ATTORNEYS section, *supra*.

20. OHIO REV. CODE §§ 2315.26-27.

was held to be constitutional due process. A referral to a referee of a change of custody case involving a minor child of divorced parents gave rise to the issue.²¹

An appellate court also stated that the Ohio constitutional provision for due process of law in Article 1, Section 16 was equivalent in meaning to the same phrase in the fourteenth amendment of the United States Constitution. The case involved an appeal from the highway director's compensation award to a jury trial in common pleas court in an eminent domain proceeding. The property owner had requested and was granted an extension of time to file his petition beyond the 10 day statutory limitation.²² Since the jury trial *de novo* on the condemnation award afforded the property owner due process for the first time, the time limit for the appeal was not considered a jurisdictional issue which the court could not extend under normal "appeal" situations.²³

Separation of Powers

Within state constitutional law, the doctrine of the separation of powers always seems to appear in an annual survey. The Supreme Court reminded the people that elections are a function of the political branch of the government and are not *per se* the subject of judicial cognizance. The Board of Elections has the final decision on the validity of a candidate's declaration of candidacy and his nominating petition.²⁴

Power to determine whether school districts should be consolidated rests in the school board and the judiciary has no jurisdiction to control the action or inaction of this board.²⁵

The judiciary will not enjoin a legislative body even though it contemplates action exceeding its authority nor will it compel legislative action by mandamus. Because of this recognition of the separation of powers the Cincinnati City Council could not be compelled by mandamus writ to make an appropriation to the park board for the operation of its garage.²⁶

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21. *Lindsay v. Lindsay*, 146 N.E.2d 151 (Ohio Ct. App. 1957). See also DOMESTIC RELATIONS section, *infra*.

22. OHIO REV. CODE § 2309.42.

23. *Barnhardt v. Linzell*, 104 Ohio App. 243, 148 N.E.2d 242 (1957).

24. *State ex rel. Ford v. Board of Elections of Pickaway County*, 167 Ohio St. 449, 150 N.E.2d 43 (1958).

25. *State ex rel. Johnson v. Butler County Board of Education*, 152 N.E.2d 358 (Ohio Ct. App. 1957).

26. *State ex rel. Hauck v. Bachrach*, 152 N.E.2d 311 (Ohio Ct. App. 1958).