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Constitutional Law

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LEGITIMATION — INHERITANCE

Following the general rule, *Howells v. Limbeck*⁷ holds that whether the act of the father in acknowledging a child as his own has the effect of legitimating the child depends upon the law of the domicile of the father at the time of the performance of the act.⁸ The case is also authority for the proposition that the child thus legitimated is placed in the same situation with regard to inheritance of Ohio land as though he had acquired the status of legitimacy in Ohio.⁹

FLETCHER R. ANDREWS

CONSTITUTIONAL LAW

The variety of constitutional issues last year appears to be greater than usual.

JUDICIAL PROCEDURES

The supreme court reaffirmed once again the rule that a constitutional question will not be decided until the necessity for such decision arises on the record before the court.¹ The decision arose in an action to enjoin municipal officers from acting favorably on an annexation to a municipality for municipal purposes. The constitutional issue — whether unvoted mandated tax levies imposed by overlapping school districts would exceed the constitutional ten-mill limitation — was avoided on the ground that the question before the court was the validity of the annexation petition rather than the constitutional question.

Two cases involved the inherent power of the judiciary to punish acts of contempt. In *State v. Local 5760 USW*² the supreme court held that this inherent power could not be limited by the legislative authority. Union officials who refused during a strike to make reasonable efforts to prevent interference by the union with court processes could be

7. 172 Ohio St. 297, 175 N.E.2d 517 (1961). See also discussion in *Domestic Relations* section, p. 466 *infra*.

8. For statement and discussion of the general rule, see GOODRICH, CONFLICT OF LAWS § 141 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS § 179 (1959); STUMBERG, CONFLICT OF LAWS 332 (2d ed. 1951); RESTATEMENT, CONFLICT OF LAWS § 140 (1934); RESTATEMENT (SECOND), CONFLICT OF LAWS § 140 (Tent. Draft No. 4, 1957).

9. See GOODRICH, CONFLICT OF LAWS §§ 142-43 (3d ed. 1949); LEFLAR, CONFLICT OF LAWS § 179 (1959); STUMBERG, CONFLICT OF LAWS 335, 411 (2d ed. 1951). The court also based its decision on the point that full faith and credit was properly accorded to the Florida decree holding that the son was the only heir of his father and entitled to the father's estate, wherever situated. On this point Judge Taft disagreed on the ground that the Florida court lacked jurisdiction over the parties.

subjected to contempt charges. One dissenting judge had reasonable doubt as to whether the necessary intent for what appeared to be a criminal contempt action was present and believed that the contempt conviction should not be upheld. In the other case,³ an attorney who advised his client to violate a court order, on the ground that the court lacked jurisdiction, was also subject to this contempt authority. The judicial hearing which involved the contempt charge was acrimonious but the supreme court, deploring this lack of restraint and decorum, refused to upset the conviction. Two judges dissented on the ground that the attorney involved, on opposing counsel's suggestion and with full knowledge of the court, agreed to submit to the contempt charge only as a means of testing the jurisdictional issue. This conviction, therefore, carried the contempt processes to an unwarranted end.

LEGISLATIVE AUTHORITY

The important restriction on the General Assembly over appointive offices provided in article II, section 27 of the Ohio Constitution was considered in 1961. Ohio Revised Code section 3769.02 created a state racing commission of five members appointed by the governor "with the advice and consent of the Senate." This legislation was held to be unconstitutional on the ground that it was an encroachment on the executive power of appointment.⁴ Under article II, section 27 "no appointing power shall be exercised by the General Assembly except as prescribed in the constitution." In other words the general assembly has no authority over appointments unless the constitution specifically so provides. As a result of this decision, in the 1961 state general elections, a new provision to the Ohio Constitution, article III, section 21, was adopted: "When required by law appointments to state office shall be subject to the advice and consent of the Senate." Detailed procedures for advice and consent were included in this new constitutional section.

The controversial economic issue of fair trade restrictions on retail merchants presented another aspect of a legislative authority issue last year. In one common pleas case⁵ the 1959 Fair Trade Act was held unconstitutional as an improper delegation of legislative power to private persons. Private manufacturers were given authority to fix minimum resale prices. A few months later the same act was held valid in an

1. *Bennett v. Diefenbach*, 172 Ohio St. 185, 174 N.E.2d 259 (1961).

2. 172 Ohio St. 75, 173 N.E.2d 331 (1961). See also discussion in *Labor Law* section, p. 500 *infra*.

3. *Petition for Green*, 172 Ohio St. 269, 175 N.E.2d 59 (1961).

4. *State ex rel. Burns v. DiSalle*, 172 Ohio St. 363, 176 N.E.2d 428 (1961).

5. *Bulova Watch Co. v. Ontario Store*, 176 N.E.2d 527 (Ohio C.P. 1961). See also discussion in *Trade Regulation* section, p. 537 *infra*.

appellate court.⁶ Obviously, a supreme court determination is needed to settle the knotty legal issues involved in this current merchandising controversy in modern society.

EQUAL PROTECTION

Equal protection in constitutional law revolves around the reasonable classification which the legislature determines when utilizing state police power to regulate public health, safety, morals, and welfare. No more difficult issues have arisen than those involved in the Sunday closing laws. Specific exemptions have in practical operation caused one business to be closed on Sunday, while an economic competitor is permitted to remain open. An appellate court upheld the Sunday closing act as valid with its present classification of exemptions,⁷ while one county court reached the opposite conclusion.⁸

In a more traditional equal protection case, a sovereign police power regulation was held valid as a reasonable classification: a municipal ordinance prohibited parking on the street near the city hall except for municipally owned vehicles.⁹

DEPRIVATION OF PROPERTY

By Due Process

Revoking a motor vehicle dealer's license for non-compliance with the statute requiring that makes of new automobiles which the dealer intended to sell be listed in the application for a dealer's license was not an unconstitutional deprivation of property.¹⁰ Similarly, no deprivation occurred under the statute authorizing the Tax Commissioner to assess the highway use tax and penalties on such tax when the taxpayer failed to file a return or filed an incomplete or incorrect return.¹¹ However, the statute prohibiting shipment of more than ten percent by weight of undersized fish and requiring all fish brought into Ohio to be subject to the laws of Ohio was held to be unconstitutional.¹²

6. Hudson Distributor's Inc. v. Upjohn Co., 176 N.E.2d 236 (Ohio Ct. App. 1961). See also discussion in *Trade Regulation* section, p. 537 *infra*.

7. State v. Corn, 113 Ohio App. 50, 177 N.E.2d 289 (1960).

8. State v. Woodville Appliance Inc., 171 N.E.2d 565 (Lucas County Ct., Ohio 1960).

9. City of Akron v. Davies, 111 Ohio App. 103, 170 N.E.2d 494 (1959).

10. Ron Best Motors, Inc. v. Ohio Motor Vehicles Dealers' and Salesmen's Licensing Bd., 113 Ohio App. 195, 177 N.E.2d 625 (1960). See also discussion in *Administrative Law and Procedure* section, p. 432 *supra*.

11. Key v. Bowers, 112 Ohio App. 546, 171 N.E.2d 913 (1960).

12. State v. Kosloff Fisheries Inc., 174 N.E.2d 640 (Ohio Munic. Ct. 1960).

By Eminent Domain

An action to recover compensation for property taken by the Director of the State Highway Department must be brought in Franklin County under Ohio Revised Code section 5501.18. Suits against the state must be brought in the manner prescribed by law under Ohio Constitution article I, section 16, which is not a self-executing constitutional provision and which does not of itself authorize actions against the state. Thus the property owner must bring suit in Franklin County.¹³

By Zoning

As usual, zoning matters presented the greatest number of constitutional issues last year. An allotment plat which had been approved and recorded was held not to fix irrevocably the rights of the parties. Zoning requirements were changed thereafter and the lot frontage of 150 feet was enforced instead of the 100 feet frontage as recorded in the plat.¹⁴ However, where owners were constructing a truck terminal and a zoning ordinance was then enacted limiting such terminals to certain specified streets, no retroactive application was permitted which would otherwise result in an unconstitutional deprivation of property.¹⁵ It was also held that for the purpose of asserting deprivation of property by an invalid zoning action, one must be the owner of the property involved.¹⁶

Two trial courts reported zoning judgments in 1961. An ordinance precluding public garages, garage repair shops, or filling stations within a radius of 100 feet of public schools, playgrounds, libraries, churches, and hospitals was invalid as to filling stations. No reasonable relationship to health, safety or general welfare existed.¹⁷ Another city was denied authority to zone beyond its boundaries. A zoning map which originally extended beyond the corporate limits was still inapplicable after the area beyond the limits was annexed.¹⁸

FREE SPEECH AND PRESS

"The Lovers," a motion picture, was held to be obscene in 1961 and not protected by the free speech and press provisions of the Constitution. Under Ohio Revised Code section 2905.34 the party who knowingly possessed and knowingly exhibited the picture was constitutionally con-

13. *Wilson v. City of Cincinnati*, 172 Ohio St. 303, 175 N.E.2d 725 (1961).

14. *State ex rel. Mar-Well, Inc. v. Dodge*, 113 Ohio App. 118, 177 N.E.2d 515 (1960). See also discussion in *Municipal Law* section, p. 505 *infra*.

15. *State ex rel. Stulbarg v. Leighton*, 173 N.E.2d 715 (Ohio Ct. App. 1959).

16. *Western Indus. Inc. v. Hamilton County, Bd. of County Comm'rs*, 173 N.E.2d 143 (Ohio Ct. App. 1960). See also discussion in *Administrative Law and Procedure* section, p. 432 *supra*.

17. *Patton v. City of Springfield*, 170 N.E.2d 873 (Ohio C.P. 1960).

18. *State v. Contini*, 176 N.E.2d 536 (Ohio C.P. 1961).

victed of a felony¹⁹ on the basis of the *Rotb*²⁰ test, discussed in a prior survey article.²¹

In another case²² involving the same movie, the defendant was convicted of a misdemeanor under a different statute, Ohio Revised Code section 2905.342, for having possessed an obscene motion picture. The Ohio Supreme Court found this statute unconstitutional for no provision was made in it with regard to knowledge or scienter on the part of the defendant. A Cincinnati ordinance relating to possession of obscene material was also held unconstitutional by the Ohio Supreme Court because it did not include the requirement of scienter or knowledge.²³ A magazine and book distributor's conviction was therefore reversed.

The ghost of movie censorship emerged in another decision. A motion picture company sought to recover from former state officials the fees paid under a movie censorship statute later held unconstitutional. The court denied recovery for no personal liability attached to the individual officials.²⁴

CRIMINAL PROCEDURES

Ohio law requires that an indigent defendant convicted of a felony be furnished a complete transcript of the record of the trial at public expense. It is not unconstitutional, however, to deny him the possession of the original records of the proceedings or the furnishing of such records at public expense.²⁵

Two search and seizure decisions were forthcoming last year also. A defendant who voluntarily invited police officers without a warrant to enter waives his constitutional right, even though he asked the officers if they had a warrant after unlocking a closet containing the goods which were seized.²⁶ Furthermore, once voluntary consent to search is given, it cannot be countermanded during the search.

The statute authorizing the Tax Commissioner to require any person to produce books and records is valid on its face. A subpoena issued

19. *State v. Jacobellis*, 175 N.E.2d 123 (Ohio Ct. App. 1961), *aff'd*, 173 Ohio St. 15, 179 N.E.2d 777 (1962). See also discussion *Criminal Law* section p. 464 *infra*.

20. *Roth v. United States*, 354 U.S. 476 (1957).

21. Schroeder, *Survey of Ohio Law — Constitutional Law*, 10 WEST. RES. L. REV. 359 (1959); Schroeder, *Survey of Ohio Law — Constitutional Law*, 11 WEST. RES. L. REV. 356 (1960).

22. *State v. Warth*, 173 Ohio St. 15, 179 N.E.2d 772 (1962). See also discussion in *Criminal Law* section, p. 464 *infra*.

23. *City of Cincinnati v. Marshall*, 172 Ohio St. 280, 175 N.E.2d 178 (1961).

24. *Paramount Film Distrib. Corp. v. Tracy*, 176 N.E.2d 610 (Ohio Ct. App. 1960).

25. *State ex rel. Lancaster v. State*, 111 Ohio App. 59, 170 N.E.2d 749 (1960).

26. *State v. Lett*, 178 N.E.2d 96 (Ohio Ct. App. 1961).