

Recent Decisions

COMMERCIAL ARBITRATION — ENFORCEMENT OF ARBITRATION AGREEMENTS — NORTH CAROLINA AND OHIO STATUTES COMPARED

A building contract provided that any future controversy thereunder was to be submitted to arbitration, stating that "the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other." A suit by the contractor was brought for alleged balance due on the contract; the defendant demurred on the ground that under the contract the plaintiff must first resort to arbitration before he might maintain this action. The Superior Court overruled the defendant's demurrer and the defendant appealed. *Held*, affirmed. The demurrer was rightly overruled since the arbitration clause concerning future controversies did not present a bar to action for breach of contract. *Skinner v. Gaither Corp.* 67 S. E. 2d 267 (North Carolina 1951).

The decision is consistent with the North Carolina Uniform Arbitration Act which limits agreements to arbitrate to "any controversy existing between the parties at the time of the agreement to submit." 1 N. C. Gen. Stat. § 1-544 (1927). The statute, a verbatim passage of the act as adopted by the National Conference of Commissioners on Uniform State Laws, might be termed a middle ground between the common law remedy of arbitration and statutes of North Carolina's commercially-minded sister states, including Ohio and New York. See HANDBOOK ON THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS and the Proceedings of the 35th Annual Meeting of 1925, 63-81. While the act has liberalized the common law rule by denying the right to rescind the contract to submit the existing controversy to arbitration once it is made [for prior law see *Long v. Cormer*, 181 N. C. 354, 107 S. E. 217 (1921); *Williams v. Branning Mfg. Co.*, 153 N. C. 7, 68 S. E. 217 (1910)], it does not embrace agreements as to future disputes, nor does it expressly provide a procedure by which to procure a decree of specific performance for direct enforcement of the agreement. STURGES, COMMERCIAL ARBITRATION AND AWARD 295 (1930); 3 Am. Jur. 856, 906; Comment. 6 N. C. L. REV. 363 (1928).

It is interesting to compare the North Carolina statute with the Ohio Arbitration Statute, OHIO GEN. CODE §12148-1 *et seq.* That act, adopted in 1931, followed the suggestion of the American Arbitration Association by repealing the former arbitration statute (OHIO GEN. CODE §12148). Under the present Ohio statute not only existing

disputes but also future disputes may be the subject of arbitration, *Riley Stoker Corp. v. Jeffrey Mfg. Co.*, 28 Ohio L. Abs. 609 (1939); note, 4 CIN. L. REV. 64; also, direct enforcement by specific performance of the arbitration agreement is provided for. OHIO GEN. CODE §12148-3; See *Utility Worker's Union of America v. Ohio Power Co.*, 36 Ohio Op. 324, 77 N.E. 2d 631 (1947); *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109 (1923); 3 Am. Jur. 909. And, under OHIO GEN. CODE §12148-2, the question in the principal case, *supra*, would have been decided in favor of the defendant, since the Ohio act provides for indirect enforcement, and breach of the agreement is a bar to an action in a court of law. *Columbus Fruit and Vegetable Coop. Ass'n. v. Reeb*, 2 Ohio Op. 109 (1934); 3 O. Jur. §17 (1943 Cum. Supp. 445). Demurrer is not the proper method to invoke the arbitration clause, however. Section 12148-2 of the General Code provides that an application for stay of proceedings must be used to invoke this indirect enforcement. *Columbus Fruit and Vegetable Coop. Ass'n. v. Reeb, supra*. A third method of enforcement under the Ohio act is provided by collateral enforcement. OHIO GEN. CODE §12148-4 gives the court jurisdiction to appoint arbitrators empowered to proceed with the arbitration. See *American Laundry Mchy. Co. v. Prosperity Co.*, 27 Ohio Op. 393 (1944).

From this necessarily limited comparison of the two statutes, it may be seen that Ohio, unlike North Carolina, has hurdled the common-law barriers against commercial arbitration, i.e., limitation to existing disputes, and insufficient enforcement of the agreements. It is interesting to note that among the states embracing the statutes as adopted by Ohio are the commercial states: New York, New Jersey, Massachusetts, California, Pennsylvania and Michigan. What has been the driving force compelling these states to adopt such radical legislation upheaving the common law roots? Obviously, dissatisfaction with the delay, expense and technicalities of the courts, and the inability of inexpert juries to understand specialized cases, all play a part. See Comment, 19 MICH. ST. BAR J. 626 (1940). The success of arbitration statutes in other states, however, has been the affirmative argument for passage in Ohio. Now that the archaic provisions are removed from the law, an increasing number of agreements to arbitrate are being incorporated not only in general contracts, but also in by-laws or articles of membership of trade associations and chambers of commerce. See KELLOR, AMERICAN ARBITRATION Ch. XVI (1948). Where such agreements are sustained by a statute making them irrevocable and specifically enforceable, their use not only insures arbitration in lieu of litigation, but also, in many cases, tends to prevent even arbitrations.

Victor F. Greenslade.

CONFLICT OF LAWS — FULL FAITH AND CREDIT — ENFORCEMENT OF
FOREIGN DEATH STATUTES

Administrator brought a wrongful death action in a Wisconsin court against the individual defendant and an insurance company. Decedent and both defendants were residents of Wisconsin, but, since the defendant had been fatally injured in an automobile accident in Illinois, the administrator based his claim upon the Illinois wrongful death statute. The trial court dismissed the complaint on the ground that the Wisconsin wrongful death statute, creating a right of action for wrongful death "provided that such action shall be brought for a death caused in this state" was declaratory of a local policy against entertaining actions based upon the death statutes of sister states. The Wisconsin Supreme Court affirmed. *Hughes, Adm. v. Fetter, et al.*, 257 Wis. 35, 42 N.W. 2d 452 (1950). On appeal to the United States Supreme Court, *Held*, reversed. The local policy of Wisconsin is in contravention of and must give way to the unifying policy of the full faith and credit clause of the United States Constitution. *Hughes, Adm. v. Fetter, et al.*, 341 U.S. 609 (1951).

In the principal case the Court reaffirmed the rule that Article IV, §1 of the United States Constitution does not require automatic subordination of local policy to foreign law in all cases. *Pink v. A.A.A. Highway Express*, 314 U.S. 201, 210 (1941); *Alaska Packers Ass'n. v. Industrial Accident Commission*, 294 U.S. 532, 547 (1935). However, there are at least two kinds of actions in which the full faith and credit clause, despite the existence of a contrary local policy, has been regularly employed to require forum recognition of rights arising under the laws of sister states. These are (1) actions which involve forum recognition of the constitutions or by-laws of fraternal benefit associations or the pertinent statutes of the states in which these associations are organized, *Modern Woodmen of America v. Mixer*, 267 U.S. 544 (1925); *Order of Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), and (2) actions brought against non-resident stockholders to enforce the assessment statutes of the state of incorporation. *Converse v. Hamilton*, 224 U.S. 243 (1912); *Broderick v. Rosner*, 294 U.S. 629 (1935). Both situations rest upon the superior consideration accorded the law of the state of incorporation because of the relationship voluntarily entered by the members of either type of association. See, e.g., *Order of Commercial Travelers v. Wolfe, supra* at 605, and *Broderick v. Rosner, supra* at 643 for discussions of this rationale.

Application of Art. IV, §1 to workmen's compensation statutes, first viewed as requiring strict observance by the forum state of the statute of the state of employment, *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932), has been all but eliminated by subsequent decisions permitting the forum to enforce its own statute when it has

a significant governmental interest in the affair. *Alaska Packers Ass'n. v. Industrial Accident Commission*, *supra*; *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939). Compulsory application of foreign law is also required by Art. IV, §1 in actions based on contracts completed in sister states, where the forum's only connection with the transaction is that the action was brought in its courts. *John Hancock Insurance Co. v. Yates*, 299 U.S. 178 (1936). For a similar result, based on the due process and contracts clauses, see *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

The principal case falls in none of these categories. Justice Frankfurter in his dissent emphasized that Illinois had no interest in the matter which could justify forcing Wisconsin to forego its policy and enforce the law of Illinois. However, the decision is in line with the general rule of conflicts that the law of the state where the fatal injury occurs governs this type of action. This rule is mechanically applied where no exclusionary policy of the forum is in issue. BEALE, *THE CONFLICT OF LAWS* 1305 and cases cited.

No Wisconsin policy against enforcement of wrongful death statutes in general was involved in the instant case since the Wisconsin statute itself provided for the enforcement of the action where the cause of death occurred in that state. Wis. Stat., §331.03 (1949). The Wisconsin policy was formulated either to prevent burdening its courts or to retaliate for the Illinois act which also prevents the enforcement of the wrongful death statutes of other states in the Illinois courts. Smith-Hurd's Ill. Ann. Stat., c. 70, §§1, 2 (1936). Neither reason seems substantial in comparison to the greater interest in unrestricted enforcement in state courts of rights validly arising under the public acts of sister states.

Although the principal case contains some limiting language, the Supreme Court recently refused to hold valid a distinction drawn by the United States Court of Appeals for the Seventh Circuit in a case arising under the Illinois wrongful death act, *supra*, which also embodies an exclusionary policy. *First National Bank of Chicago v. United Air Lines*, 190 F. 2d 493 (1951). In that case the court distinguished the instant decision on the ground that the Wisconsin policy, which precluded the enforcement of the wrongful death statutes of sister states under any circumstances, might have resulted in a denial of any remedy to the plaintiff when the defendant could be serviced only in Wisconsin, while the Illinois statute did not present the same danger since enforcement of the foreign statute in the Illinois courts is permitted when the defendant cannot be serviced in the state in which the plaintiff's right of action arose. Upon review, however, the Supreme Court held the principal case controlling, *First National Bank of Chicago v. United Air Lines*, 72 Sup. Ct. 421 (1952), a result which indicates continued employment of the full faith and credit

clause to invalidate state exclusionary rules based on insubstantial local policy whether or not relief is available elsewhere.

Anthony R. De Santo.

EVIDENCE — ADMISSIBILITY OF CONFESSIONS OBTAINED
DURING ILLEGAL DETENTION

Petitioner was convicted in a District Court of Nebraska of manslaughter. The Supreme Court of Nebraska affirmed the conviction over the objection that the admission of petitioner's confession violated the Fourteenth Amendment of the Federal Constitution. Petitioner, a 38 year old Mexican farm hand who could neither speak nor write English, claimed that confessions of homicide made to Texas authorities after he had been in illegal custody for 25 days and while without the advice of counsel and prior to his arraignment, were involuntary and obtained in violation of the requirements of due process. *Held*, conviction affirmed. Nebraska, in admitting the confessions, neither violated federal requirements of due process nor standards of decency and justice. Due process requires only that the confession be voluntary. *Gallegos v. State of Nebraska*, 342 U.S. 55 (1951).

State courts almost uniformly have admitted any confession that is deemed to be voluntary and trustworthy, regardless of the method used to obtain it. *People v. Viti*, 408 Ill. 206, 96 N.E. 2d 541 (1951); *Commonwealth v. Bryant*, 367 Pa. 135, 79 A. 2d 193 (1951); See 3 Wigmore, Evidence §822 (3rd ed. 1940); 94 A.L.R. 1036 (1934). That the confession was obtained during a period of illegal detention in violation of an arraignment statute has not in itself required exclusion of the confession as evidence, although it may be considered in determining if the confession was involuntary. *State v. Pierce*, 4 N.J. 252, 72 A. 2d 249 (1950).

Prior to 1943 the Supreme Court of the United States used the same test in reviewing federal criminal cases. *Wilson v. United States*, 162 U.S. 613 (1896); *Wan v. United States*, 266 U.S. 1 (1924). In 1943, however, the Court added to the voluntary-trustworthy test the stipulation that the confession, even though voluntary, would be excluded if it had been obtained during a period of detention illegal because of a failure to arraign the accused before a committing magistrate. Like most state arraignment statutes, Rule 5 (a) of the Federal Rules of Criminal Procedure requires an arresting officer to take the arrested person before the nearest committing officer without unnecessary delay. Thus, if federal officers violate this rule, any confession obtained during the period of illegal detention will not be admitted as evidence in

court. *McNabb v. United States*, 318 U.S. 332 (1943); *Upshaw v. United States*, 335 U.S. 410 (1948). Since the reason for this new doctrine is to abolish unlawful detention, a confession to one crime, made while the accused was in lawful custody concerning another crime, is admissible even though the accused had not been arraigned on the crime to which he confessed. *United States v. Carignan*, 342 U.S. 36 (1951).

The Court stated in the *McNabb* case, *supra*, that the illegal detention rule was merely a rule of evidence which it had the right to require in the federal court system but which it could not impose upon the states. Prior to the *McNabb* case, *supra*, in reviewing cases from state courts, the Court had used the voluntary-trustworthy test. *Chambers v. Florida*, 309 U.S. 227 (1940); *White v. Texas*, 310 U.S. 530 (1940). In several cases following the *McNabb* case, *supra*, however, the Court came very close to stating that illegal detention in violation of arraignment statutes was in itself so "inherently coercive" that it was a deprivation of due process. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Malinski v. New York*, 324 U.S. 401 (1945); *Haley v. Ohio*, 332 U.S. 596 (1948). The states were beginning to feel the effect of the *McNabb* rule. In the *Ashcraft* case, *supra*, the Court disregarded the voluntary-trustworthy test and relied heavily on the fact that the confession had been obtained while the accused was held incommunicado during a 36 hour delay in arraignment. Mr. Justice Jackson declared in his dissent that the Court had forgotten the voluntary-trustworthy test and was punishing police practices. Apparently the Supreme Court was beginning to demand the same civilized standards of state police that it demanded of federal police. In his concurring opinion in the *Malinski* case, *supra*, Mr. Justice Frankfurter not only condemned delay in arraignment for the purpose of obtaining a confession, but intimated that in itself it might be a deprivation of due process. In the *Haley*, case, *supra*, Mr. Justice Douglas, speaking for the Court said, "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them." In the following year the Supreme Court reversed three more cases where the arraignment had been delayed for the purpose of obtaining a confession, even though the Court felt the confessions were trustworthy. *Watts v. Indiana*, 338 U.S. 49 (1949); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949). In a dissent to two of these three companion cases, 338 U.S. 52, 62 (1949), Mr. Justice Jackson raised the query that "Each of these murders was unwitnessed, and the only positive knowledge on which a solution could be based was possessed by the killer The seriousness of the Court's judgment is that no one suggests that any course held promise of solution of these murders other than to take the suspect into custody for questioning. The alternative was to close the

books on the crime and forget it, with the suspect at large. This is a grave choice for a society in which two thirds of the murders are closed out as insoluble Is it a necessary price to pay for the fairness which we know as 'due process of law'?"

In spite of Mr. Justice Jackson's cogent dissent, it appeared that the Supreme Court was ready to demand obedience to the various state arraignment statutes as a requirement of due process, although the Court had been influenced in each of the cases by other factors, *e.g.*, the age of the petitioner, *Haley v. Ohio, supra*.

These strong Supreme Court opinions condemning the use of confessions obtained during illegal detention made it seem likely that many state courts would themselves require observance of their arraignment statutes. Only a few states, however, have even acknowledged the persuasiveness of the *McNabb* doctrine. *e.g. State v. Kothhoff*, 67 Idaho 319, 177 P. 2d 474 (1947); *Commonwealth v. Mayhew*, 297 Ky. 172, 178 S.W. 2d 928 (1944). The majority flatly refuse to follow it on the grounds that if a confession is trustworthy it would be an injustice to society to deny its use in evidence against a criminal solely because of the manner in which it was obtained. *People v. Brocamp*, 307 Ill. 448, 138 N.E. 728 (1923); *Owens v. State*, 133 Miss. 753, 98 So. 233 (1923). This refusal to follow the *McNabb* rule is inconsistent with the reasoning these same states use in excluding evidence obtained by an illegal search or seizure—evidence which is much more reliable and trustworthy than an illegally obtained confession. *People v. Lazenby*, 403 Ill. 95, 85 N.E. 2d 660 (1949); *Winston v. State*, 209 Miss. 799, 48 So. 2d 513 (1951). If a person cannot pose as the accused's attorney in order to get an admissible confession, even though that confession would likely be trustworthy, it is inconsistent to allow him to obtain one by violation of a statute. Yet at least one state even permits this inconsistency. *People v. Barker*, 60 Mich. 227, 27 N.W. 539 (1886). Again, many states, though refusing to follow the *McNabb* rule itself, follow a theory of public policy similar to that behind the *McNabb* rule when they refuse to convict a person who has been the victim of police entrapment. *People v. Lee*, 9 Cal. App. 2d 99, 48 P. 2d 1003 (1935); *State v. Hicks*, 326 Mo. 1056, 33 S.W. 2d 923 (1931); see 22 C.J.S., Criminal Law sec. 45.

People familiar with the third degree practice maintain that the only effective way to eliminate it is by a requirement that the arrested person be immediately arraigned before a magistrate. 3 Wigmore, Evidence §851 (3rd ed. 1940); Report on Lawlessness in Law Enforcement, National Committee on Law Observance and Enforcement (1931). Once before a magistrate, the accused is told of his rights; he may secure counsel and obtain the assistance of his friends. These rights he can not exercise while he is being held incommunicado by the police. To remove the inducement to resort to such illegal practices

as the third degree, the courts should deny the use of any fruits these practices may produce.

Before the instant case, many people hoped and felt the day was near when the Supreme Court would eliminate illegal detention and its offspring, the third degree, by making immediate arraignment a requirement of due process. In the instant case, however, the Court has apparently abandoned its crusade to compel observance of arraignment statutes by state officials. The Court disregarded such cases as *Ashcraft v. Tennessee*, *supra*, and *Haley v. Ohio*, *supra*, where stress had been laid upon violation of arraignment statutes and third degree methods of police as being violations of due process. Perhaps the instant case is distinguishable upon the ground that the petitioner's confession came early in the 25 day period of illegal detention. At any rate, it is hoped that the Court's step backward is only temporary, and some day soon it will declare secret, illegal detention of an accused for the purpose of obtaining a confession to be a violation of due process in itself.

Duane L. Isham.

LOCAL GOVERNMENT LAW — MUNICIPAL POWER TO DEFINE CRIMES

The defendant was convicted of violating Section 943-2 of the General Ordinances of the City of Dayton, Ohio, which defined criminal assault and battery in the exact terms of Ohio General Code Section 12423, but which provided a greater maximum penalty than the statute. The maximum penalty provided by the ordinance was \$1,000 or one year imprisonment or both, while the maximum penalty under the statute was only \$200 or six months imprisonment or both. The defendant contended that a municipality has no power to define assault and battery as a crime. On appeal, *held*, affirmed. A municipality has constitutional authority to adopt and enforce a penal ordinance defining assault and battery. *City of Dayton v. Miller*, 154 Ohio St. 500, 96 N.E. 2d 780 (1951).

Until 1912 all municipal police power in Ohio was derived by delegation from the General Assembly. Under this system, although the General Assembly did not delegate the power to define and punish felonies, they did delegate the power to define and punish certain misdemeanors. Assault and battery was not among them. *City of Wellsville v. O'Connor*, 14 Ohio Cir. Dec. 689 (1902).

In 1912 the people of Ohio substantially modified the pattern of complete legislative supremacy by approving the Home Rule Amendment to the Constitution. This amendment directly grants the cities

and villages authority "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Const. Art. XVIII, §3. By this grant the municipalities and the state exercise the police power concurrently in prohibiting and punishing criminal acts. *Greenberg v. City of Cleveland*, 98 Ohio St. 282, 120 N. E. 829 (1918). The courts have consistently held that assault and battery ordinances are within the scope of the municipal police power. *Kearney v. Cincinnati*, 29 Ohio Dec. N.P. 594 (1919); *In Re Calhoun*, 87 Ohio App. 193, 94 N.E. 2d 388 (1949); *Matthews v. Russell*, 87 Ohio App. 443, 95 N.E. 2d 696 (1949).

Since a municipality's power to define a crime and provide punitive sanctions is no longer in question, the issue has become one of limitation. May a municipality define a major crime such as arson, robbery or larceny, and provide penalties greater than one year imprisonment?

The ordinance in the principal case illustrates the extent of municipal police regulation to date. This is the first criminal assault and battery ordinance to be held valid by the Supreme Court of Ohio. The opinion expresses no limit to the type of crime that a municipality may define. The penalty imposed by the ordinance is severe. It not only exceeds the penalty in the Ohio Statute by a wide margin, but if the imprisonment provided was for one more day, it would be the equivalent of a felony under federal statutes. 18 U.S.C. §1 (1948).

Limitation on municipal police power is provided in the Home Rule Amendment, which requires that an ordinance must not conflict with the general laws of the state. As this has been interpreted, conflict arises only when particular conduct of citizens is both authorized by a statute and prohibited by an ordinance, or vice versa. *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923). The application of this rule creates difficulties, but it is certain there could be no conflict, in this sense, if a municipality would adopt in an ordinance the exact language of a statute defining a major crime. The ordinance and the statute would then be prohibiting the same conduct.

The non-conflict clause does not limit the municipal power to provide punitive sanctions, since a penalty does not alter the rule of conduct required by the statute. Though the ordinance might impose a greater penalty than the statute, the same conduct would still be prohibited. *Youngstown v. Evans*, 121 Ohio St. 342, 168 N.E. 844 (1929); *Leipsic v. Folk*, 38 Ohio App. 117, 176 N.E. 95 (1931); *In re Calhoun*, 87 Ohio App. 193, 94 N.E. 2d 388 (1949); *Matthews v. Russell*, 87 Ohio App. 443, 95 N.E. 2d 696 (1949).

The General Assembly cannot use the non-conflict clause to limit expressly the municipal power to define crimes and provide punishment. No conflict with a statute expressly limiting the punishment an ordinance may impose is created by the adoption of a penal ordinance

exceeding that limit, since the statute does not prescribe a general rule of conduct to be followed by citizens, but merely regulates municipal legislative action. *Youngstown v. Evans, supra; Matthews v. Russell, supra*. A statute that limits the type of crime of a municipality may define would be ineffective for the same reason.

The only constitutional limitation on the severity of punishment is that forbidding the infliction of "cruel and unusual punishments." Ohio Const. Art. I §9. No matter how severe, the *amount* of fine or *length* of sentence imposed does not constitute "cruel and unusual punishments." *Holt v. State*, 107 Ohio St. 307, 314, 140 N.E. 349 (1923); *In Re Calhoun, supra*.

Since there is no effective express limitation in the Constitution and the General Assembly cannot provide a limitation, what, if anything, will restrain the municipalities from defining major crimes?

The fundamental rule that the sovereign alone can create a crime is no longer a restraint on Ohio municipalities. This restraint was removed by the sovereign, the people of Ohio, when the power to define crimes was constitutionally delegated to the municipalities. The issue now is, did the sovereign intend to delegate to municipalities the power to create major crimes?

The sovereign's intent is not clear, but a strong historical argument can be made that the power to define major crimes was not intended to be delegated. The basis of the argument is the fact that this power has never been delegated to cities anywhere else in the United States. If the delegation of such an extraordinary power had been intended, presumably there would have been a sharp conflict of opinion among the Constitutional Convention delegates, followed by long debates. The Constitutional Convention Debates of 1912 contain no such discussion.

Since no local government has attempted to define a major crime, the courts have not been required to rule on the extent of the substantive home rule power. The only judicial expression is a syllabus which states that the power to define a felony is lodged in the General Assembly exclusively. *State v. O'Mara*, 105 Ohio St. 94, 136 N.E. 885 (1922); *approved in, State v. Steele*, 121 Ohio St. 332, 168 N.E. 847 (1929). This syllabus does not solve the problem since the principle of law here being considered was neither in issue nor discussed in the majority opinion of either case. There is no assurance the Supreme Court would rule the same way if that question were in issue.

The sweeping general language used in the Home Rule Amendment leaves the police power of Ohio municipalities uncertain. A literal interpretation would allow the municipalities to define major crimes, but the history of the amendment suggests an implied limitation. If a constitutional convention is voted in 1952, that body might

find it advantageous to propose an amendment to resolve this uncertainty rather than leave it for interpretation by the courts at a later date.

Charles E. Shanklin.

SALES AND USE TAX — EXEMPTIONS

The taxpayer was in the business of manufacturing and selling concrete by the "transit mix" method. A mixer was mounted on a motor truck chassis and the mixing or manufacture of the concrete occurred during the time the mixer and its contents were being transported to the location where the concrete was to be delivered and utilized. The concrete mixing apparatus and the motor truck chassis were separate units and were separately purchased from different sources.

The Tax Commissioner of the State of Ohio entered an order levying an assessment of sales and use taxes on the truck chassis. The order was affirmed by the Board of Tax Appeals. On appeal, *held*, affirmed. The truck chassis were not employed directly in the production of tangible personal property for sale by manufacturing within the meaning of the Sales and Use Tax Acts. *W. E. Anderson & Sons Co. v. Glander, Tax Comm'r.*, 154 Ohio St. 561, 97 N. E. 2d 29 (1951).

The Ohio General Code exempts from the sales and use taxes items where "... the purpose of the consumer is ... to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, processing, . . ." OHIO GEN. CODE §§5546-1, 5546-25.

Since the adoption of the Ohio Sales Tax law in 1934, Section 5546-1 has undergone several changes. A consideration of these changes is helpful in ascertaining the legislative intent.

In its original form the statute, OHIO GEN. CODE §5546-1, read: "Retail sale' and 'Sale at retail' include all sales excepting those in which the purpose of the consumer is . . . to use or consume the thing transferred in manufacturing, retailing, processing, or refining or in the rendition of a public utility service." 115 Ohio Laws, pt. 2, 306 (1934). The statute was later amended to add the word "mining" after the word "refining". 116 Ohio Laws 242 (1935). The pertinent part of the statute was then changed to its present form of: ". . . to use or consume the thing transferred directly in the production of tangible personal property for sale by manufacturing, . . . processing, . . . mining, . . ." 116 Ohio Laws, pt. 2, 70 (1935). There have been several other amendments to this section but they are not relevant to this discussion.

From the history of such statutory changes, it appears that the exception was first intended to cover certain industries. These industry-wide exceptions were finally restricted to include the sales and use of only those items of tangible personal property, in an industry, used or consumed *directly* in producing tangible personal property for sale. *Fyr-Fyter Co. v. Glander, Tax Comm'r.*, 150 Ohio St. 118, 80 N.E. 2d 776 (1948).

A fundamental objective of the Ohio Sales Tax Act is to prevent a pyramiding of taxes. The tax, therefore, is levied wherever possible on the sale to the ultimate consumer. Under the original act practically anything purchased by a manufacturer was exempt. This was following the above stated policy to the utmost since any cost to the manufacturer is ultimately passed on to the final consumer. A conflict arose between this objective of no double taxation and that always present objective of raising revenue. As a result the present form of the statute was adopted so as to bring these objectives into balance. See 11 OHIO ST. L. J. 143 (1950).

Recently there have been many cases interpreting this statute. The courts have said that for the purchase of an item to be excepted from taxation under this section the item must be indispensable to, and directly connected with, the actual manufacture or processing of the particular article to be sold. *Jackson Iron & Steel Co. v. Glander, Tax Comm'r.*, 154 Ohio St. 369, 96 N.E. 2d 21 (1950).

In the field of transportation equipment, the means of transportation is exempt from the sales or use tax only when the transportation is a part of the processing. The court in *Tri-State Asphalt Corp. v. Glander, Tax Comm'r.*, 152 Ohio St. 497, 90 N.E. 2d 366 (1950) held that boom and bucket cranes that had the sole use of conveying ingredients to the place of processing were not within the exception to the tax. In *Dye Coal Co. v. Evatt, Tax Comm'r.*, 144 Ohio St. 233, 58 N.E. 2d 653 (1944), the court held that the purchase of trucks for use in conveying coal from the pits to a tippie where such coal was cleaned and graded for shipment was exempt from taxation for the reason that such was a part of mining. The holding in *Crowell-Collier Pub. Co. v. Glander, Tax Comm'r.*, 155 Ohio St. 511, 99 N.E. 2d 649 (1951), was that a line conveyer used to convey bundles of magazines from the mailing room to railroad cars and trucks was not exempt from the sales tax because "the production is completed when the conveyer picks them up."

The principal case follows this narrow interpretation of the word "directly" and tends to extend this interpretation by permitting an exception of only that part of the item that is directly used in production.

WORKMEN'S COMPENSATION — THIRD PARTY LIABILITY

The defendant, who owned and personally operated one of the trucks in his trucking business, invited the plaintiff to sell vegetable produce from the open tail-gate of the truck. The defendant employed truckers and had elected to be bound as an employer under the Illinois Workmen's Compensation Act. The plaintiff and his employer were also under the Act. Injured by the personal negligence of the defendant in operating his truck, the plaintiff brought a common law action for damages, contending that Section 29 of the Illinois Workmen's Compensation Act, which limits an injured employee to compensation when injured by a negligent third party also "bound by this Act," was applicable only to third party employees and not third party employers directly causing the injury. The lower court dismissed the suit on the basis of the Illinois Act. On appeal, *held*, affirmed. Section 29 of the Workmen's Compensation Act provides compensation as the exclusive remedy available to the plaintiff. *Petrzelli v. Propper*, 409 Ill. 365, 99 N.E. 2d 140 (1951).

Under Section 29 of the Illinois Workmen's Compensation Act, where the employer, his injured employee, and the negligent third party are all "bound by this Act", the common law right of action of the employee is "abolished." In these circumstances, the employee is given compensation and his cause of action is transferred to his employer, who may sue the third party to recover damages not exceeding the aggregate amount of compensation payable to the injured employee under the Act. ILL. REV. STAT. c. 48 §29 (1947). Prior to the instant case, two types of cases involving third party liability under Section 29 of the Illinois Workmen's Compensation Act had arisen; actions against a third party employee, *Thorton v. Herman*, 380 Ill. 341, 43 N.E. 2d 934 (1942), and actions against a third party employer under the doctrine of respondeat superior, *Stevens v. Illinois Central R.R.*, 306 Ill. 370, 137 N.E. 2d 859 (1923). In both types of action the injury had been caused by a third party employee rather than a third party employer. Thus, although the Court in both situations limited the injured employee to his remedy of compensation and stated that "bound by this act" as used in Section 29 included third party employers as well as third party employees, there was some doubt whether, in reality, the Act did not provide a personal defense to third party employees transferable to third party employers only in suits based on the doctrine of respondeat superior. The instant case, involving as it did a third party employer directly responsible for the injury, settled that doubt. Third party employers are directly protected by Section 29 of the Act.

The rationale of these decisions has been that Section 29 should be read in the context of the entire Workmen's Compensation Act,

and interpreted in the light of the public policy behind the Act, that accidents caused in industry are to be borne as a part of the cost of production in that industry. *Hays v. Illinois Terminal Transportation Co.*, 363 Ill. 397, 2 N.E. 2d 309 (1936). A more detailed analysis of the public policy behind Section 29 of the Illinois Act can be found in DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 611-616 (1936) where it is stated, "Suits against third parties have been less advantageous to the injured employee than collection of compensation. This is due to slow payment if judgment is received, lump sum payment, and high cost of litigation imposed on the employee, all of which the Workmen's Compensation Act intended to cure." In other words, Section 29 by forcing the employee to resort to the Act exclusively, in the majority of cases should leave him in a better position. Another explanation of Section 29 may be found in WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS 1 (1948) which states that a major purpose of subrogation provisions such as Section 29 is to grant a method of relief to innocent employers, and at the same time to prevent exorbitant claims against third parties who have accepted the Act and are sharing in its burdens. While the rationale of the Illinois Court and the analysis of both Dodd and Wright are correct in theory, the desired results are not always achieved in practice. The injured party's employer often contests awards resulting in delay of the receipt of compensation by the employee. In turn, this delay often prevents compensation from being fixed and determined until the Statute of Limitations has run, barring recovery by the employer against the negligent third party. See 7 CHI. L. REV. 569 (1939-40). The Illinois Court in recognition of this problem has stated, ". . . we feel bound to hold that the right of the employer to sue is not a new cause of action created by Section 29, but is the employees right of action taken from him and transferred to the employer. We recognize this construction will in many cases defeat recovery from the third party under Section 29, for it seems quite clear that the employer is in no position to commence suit to enforce his right of action until the damage he has sustained have been fixed and determined." *Schlitz Brewing Co. v. Chicago R.R.*, 307 Ill. 322, 138 N.E. 658 (1923).

Other states, recognizing that all inclusive subrogation provisions do not solve every problem, have used such provisions only where the third party is a fellow employee, or at least working on the same project. *Caira v. Caira*, 296 Mass. 448, 6 N.E. 2d 431 (1937); WRIGHT, SUBROGATION UNDER WORKMEN'S COMPENSATION ACTS c. IV (1948). Ohio's Workmen's Compensation Act contains no subrogation provisions whatsoever. OHIO GEN. CODE §1465-37 et seq.

The instant case, the first under Section 29 of the Illinois Act involving an injury directly caused by a third party employer, has

clearly established that under the Act third party employers as well as third party employees are directly covered. Although the result reached is consistent with the public policy behind the Act, the administration of Section 29 still leaves many problems to be solved.

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