

SOVEREIGN IMMUNITY UNDER STATUTES OF LIMITATION

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Any discussion of sovereignty and the statute of limitations necessarily begins with the common law maxim *nullum tempus occurrit regi*—time does not obstruct the rights of the government. The basis of the rule has generally been stated to be that it is an incidental attribute of sovereignty, necessary to protect the public against the negligence of its servants. The maxim has survived in America, and any lawyer approaching a problem which concerns the State of Ohio can safely accept as axiomatic the rule that statutes of limitation do not run against the State¹ unless the intention that they shall so run is obvious.

Because of the general application and acceptance of this rule, the State has not been called upon to assert it directly in many litigated cases. Since the Supreme Court of Ohio first announced that the common law rule is applicable in Ohio,² there have been only four cases in which the decisions of that court have turned upon its application. Two of those cases³ involved the school lands set aside by congress to the legislature in the so-called "French Grant"; and two⁴ involved the fee-simple title of the State in the canal lands acquired under the Act of February 4, 1825.⁵

While the State has thus enjoyed a complete immunity from the operation of the statute, that immunity has not been extended to its subdivisions. It was held at an early date in the case of *City of Cincinnati v. First Presbyterian Church*,⁶ that the immunity was an attribute of sovereignty only, and did not extend to municipal corporations. This rule was extended by later decisions which specifically held that neither town-

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¹ The capitalized form of the word "State" is used advisedly in this context and throughout this article. As will appear more fully below, the immunity of the State has not been extended to its subdivisions, which in a non-specific sense perform "state" functions.

² *Monroe v. Lessee of Morris*, 7 Ohio 262 (1835). This case did not involve the State directly, but held that one asserting title to land against the record owner under a claim of open, notorious, and adverse possession for a period of 21 years could not consider that period of time which ran prior to a tax sale of the record owner's interest. To hold otherwise, said the Court, would be to hold that the statute could run against the State and that the purchases at the tax sale received nothing, rather than the new and perfect title which the statute assured him.

³ *Trustees of Green Township v. Campbell, et al.*, 16 Ohio St. 11 (1864); *Seeley v. Thomas*, 31 Ohio St. 301 (1872).

⁴ *Ohio ex rel. v. Railway Co.*, 53 Ohio St. 189 (1895); *State of Ohio v. Griftner*, 61 Ohio St. 201, 55 N.E. 612 (1899).

⁵ 23 Ohio Laws 50.

⁶ 8 Ohio 298 (1838).

ships⁷ nor counties⁸ shared in the State's immunity from the operation of the statute.

The county case referred to above, *Hartman v. Hunter, Treasurer*,⁹ held that an action brought by a county treasurer to recover certain ditch assessments was barred by the six-year statute of limitations. This case was distinguished only a year later by the decision in *Wastoney v. Schott, Treasurer*,¹⁰ involving an action by a county treasurer to recover personal property taxes which had become due more than six years previously. The court held in the second case that the State was the real party interested in the recovery of the personal property taxes, and that the statute of limitations was no bar to the action. This distinction has been recognized in two lower court cases which were subsequently affirmed by the supreme court,¹¹ and apparently is still valid.

It has been stated by at least one author that "there is much confusion and conflict in the cases in Ohio, as to whether statutes of limitation apply to municipalities, or whether the immunity of the state from the operation of such statutes descends upon them."¹² The problem of arranging and classifying the cases involving municipal corporations so as to ascertain the accuracy of that statement is beyond the scope of this article. Those cases necessarily involve the law of adverse possession and the substantive law governing municipal corporations. Since they usually involve encroachments upon public property, they involve the law of nuisances and the question of whether time can ever be a bar to the abatement of a continuing nuisance. Each case must be analyzed to determine whether the municipal corporation seeks to exercise rights in a proprietary capacity or as the guardian of some right vested in the public. And finally, as in all cases of adverse possession, the particular facts concerning the occupancy of the claimant must be established. In addition, some cases involve the application of Ohio Revised Code §2305.05 (11220) which specifically provides that streets and alleys on the original plat of a municipal corporation which are never opened to public use may be lost by adverse possession of the abutting owners.

For all of the above reasons, each case involving a municipal corporation must be determined on its own facts and by those precedents which are particularly applicable. There is certainly no general rule that the municipality enjoys a clear exemption from the operation of the statute.

⁷ *Mount v. Lakeman*, 21 Ohio St. 643 (1871); *Oxford Township v. Columbia*, 38 Ohio St. 87 (1881).

⁸ *Hartman v. Hunter, Treasurer*, 56 Ohio St. 175, 46 N.E. 577 (1897).

⁹ *Ibid.*

¹⁰ 58 Ohio St. 410, 51 N.E. 34 (1898).

¹¹ *State ex rel. Welty, Pros. Att'y v. Ohio Nat'l Bank*, 7 Ohio N.P. (N.S.) 43, 19 Ohio Dec. 82; *aff'd without opinion* 83 Ohio St. 449 (1910); *State ex rel. Rulison, Pros. Att'y v. Western German Bank*, 13 Ohio Cir. Ct. (N.S.) 543, 22 Ohio Cir. Dec. 496; *aff'd without opinion* 86 Ohio St. 305 (1912).

¹² 25 O. JUR., *Limitation of Actions* §285.

Even the plain rule in favor of the State leaves many questions unanswered and leaves a sizable area for statutory construction by the courts presented with these problems. As was set out above, the American rule is that statutes of limitation do not run against the State *unless the intention, that they shall so run is obvious*. This rule also finds expression in the line of cases resting on the principle set out in *State ex rel Parrott v. Board of Public Works*,¹³ that the State is not bound by the terms of a general statute, unless it be so expressly enacted. The question still remains as to when the intention to bind the State is "obvious," or "expressly enacted."

In some cases the problem is easy, since the legislature may have expressly limited the time in which the State's officers may act. Ohio Revised Code §5739.16 (5546-9d), for example, limits the period within which the tax commissioner may issue sales tax assessments. Ohio Revised Code §323.28 (2670), on the other hand, specifically provides that no statute of limitations shall apply in an action to sell land for delinquent taxes and assessments. In most cases, however, the statute is silent. For example, Ohio Revised Code §2117.12 (10509-133) provides that an action on a claim rejected by an executor or administrator must be commenced within two months or be forever barred. No mention is made of the State. In two cases involving this statute,¹⁴ different courts of appeal have taken different views as to its application to the State—one court holding that it barred an action by the Division of Aid for Aged, and another holding that it did not. The court holding that the State was barred, *Division of Aid for Aged v. Wargo*¹⁵ reasoned that the purpose of the statute was to expedite the settlement of decedents' estates, and that that salutary purpose could not be accomplished so long as the State could pursue its claim after the running of the statute. Since that thought was not "expressly enacted" the court must have taken it to be "obvious."

Such cases present problems that the citing of a legal maxim will not solve. Each statute providing for a special period of limitation raises the question of whether its particular problem is of such a nature that the legislature "obviously" intended to override the State's immunity from the operation of the statute. Without purporting to list all such examples, attention is directed to the following statutes in which are inherent the problem dealt with by the courts in the *Marshall* and *Wargo* cases:¹⁶

Ohio Revised Code §2127.40 (10510-49, 10510-50) governing fraudulent conveyances made by a decedent during his lifetime.

¹³ 36 Ohio St. 409 (1881).

¹⁴ *Division of Aid for Aged v. Marshall*, 42 Ohio L. Abs. 131, 59 N.E. 2d 942 (1944); *Division of Aid for Aged v. Wargo* 48 Ohio L. Abs. 47 (1947). This opinion was followed by the Court of Common Pleas of Franklin County in the case of *State v. Drake*, 64 Ohio L. Abs. 177, 106 N.E. 2d 91 (1952).

¹⁵ 48 Ohio L. Abs. 47, 73 N.E. 2d 942 (1944).

¹⁶ See note 14, *supra*.

Ohio Revised Code §2117.41 (10509-217, 10509-218, 10509-219) governing contingent claims that accrue after a decedent's death.

Ohio Revised Code §1313.54 (11102) and 1313.55 (11103-1) dealing with the bulk sales law.

Ohio Revised Code §1113.10 (710-92) providing a three-period for suits on claims rejected by the Superintendent of Banks.

None of these statutes has been involved in a reported case involving the State, so there are no authoritative answers as to their application. But so long as the *Wargo* case, holding that the Division of Aid for Aged is bound by the limitation set out in Ohio Revised Code §2117.12 (10509-133), remains the most authoritative expression on the subject, the traditional rule appears to be in line for some important modifications.

Little needs to be added to the above discussion in order to cover the application of the statute to the other sovereign in our dual system. All that has been said about the common law rule as it has been applied in America applies with full force to the United States. All of the cases hold that the United States is not bound by any limitation statute, state or federal, unless Congress has clearly expressed its intention that it should be so bound. It is not necessary to recount the cases here, since any digest or encyclopedia is replete with such lists.¹⁷

The rule is not limited by the fact that the United States goes into a state court to enforce its rights. A recent case which contrasts with the above discussion of the State's immunity is *United States v. Summerlin*.¹⁸ There the Federal Housing Administrator had become the assignee of a claim against the estate of a decedent. He filed his claim in the state court after the statutory period of limitation had passed, and all of the state courts held that the claim was barred. The Supreme Court reversed, saying that the state had exceeded its powers, and that it could not bar a claim of the United States since Congress had not assented.

While the federal courts construe the rule of sovereign immunity strictly in favor of the government, decisions declaring a binding limitation are not unknown. Two recent decisions of the Supreme Court, *Unexcelled Chemical Corp. v. U.S.*¹⁹ and *U.S. v. Lindsay*²⁰ found such limitations in construing particular acts.²¹ So the problem of the lawyer

¹⁷ See, for example, 34 AM. JUR., *Limitation of Actions* §390-391.

¹⁸ 310 U.S. 414 (1940).

¹⁹ 345 U.S. 59 (1953).

²⁰ 346 U.S. 568 (1954).

²¹ The *Unexcelled Chemical* case held that the two year limitation prescribed in the Portal-to-Portal Act (29 U.S.C. §255) applied to a cause of action which had accrued to the U.S. under the Walsh-Healey Act (41 U.S.C., §35d, 36). The *Lindsay* case held that the six-year limitation of the Commodity Credit Act began to run in 1945 when the defendant delivered damaged wool to the government, even though the Act was not passed until 1948.

confronted with a federal statute is basically the same as the problem under the state practice: can the statute be construed to indicate that Congress clearly intended to include the United States within the period of limitation.