Cleveland State Law Review

Volume 21 | Issue 1 Article 4

1972

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THE DOCTRINE OF SOVEREIGN IMMUNITY has been pronounced dead in Ohio. That report may prove to have been exaggerated. At the very least, the anatomy of that which has passed and that which remains is beclouded in uncertainty.

The Court of Appeals of Ohio for Cuyahoga County, sitting in Cleveland, had before it an appeal by plaintiff from judgment for defendant following the granting of a motion to quash service of process on the State of Ohio. The action was for the recovery of damages from the state for the wrongful death of plaintiff's decedent, alleged to have been caused by the activity of the Ohio National Guard on the campus of Kent State University in May of 1970. Judgment was reversed and the cause remanded for further proceedings.

The court-written syllabus, which does not have the controlling force peculiarly attributed to the syllabi of the Ohio Supreme Court,[3] summarizes the decision in the following words:

> 1. The State of Ohio is responsible under the doctrine of respondeat superior for the tortious acts of its authorized agents. A complaint alleging the tortious conduct of an agent while engaged in authorized activity on behalf of the state states a cause of action.
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> 2. The doctrine of sovereign immunity cannot be supported in Ohio in the light of the history of Section 16, Article I of the Ohio Constitution, as amended in the Convention of 1912, and the legislative policy reflected in the general procedural statutes governing suability in Ohio. Moreover, a special shield for the state against responsibility for its tortious acts is unjust, arbitrary, and unreasonable and results in discrimination prohibited by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.
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> 3. If the doctrine of sovereign immunity had any vitality in Ohio after the amendment of Section 16, Article I, in the Convention of 1912, it was derived from judicial interpretation. As a creation of the courts, the doctrine can be removed by the judiciary.
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> 4. The possibility that the removal of sovereign immunity may impede or inhibit agents of the state in the proper performance of necessary, authorized functions on behalf of the state can be obviated by the retention of immunity from civil liability

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[1] Krause v. State, 28 Ohio App. 2d 1,—N.E. 2d— (1971).

[2] This comment will be restricted to tort actions, although some interesting and different results are obtained in contract actions and in actions relating to state taking of private property.

[3] Parkview Hospital v. Hospital Service Ass'n., 8 Ohio App. 2d 315, 222 N.E. 2d 314 (1966).

for individual agents of the state when performing in an authorized capacity on the state's behalf while at the same time imposing liability on the state when the activity is tortious.[4]

The decision thus promulgates three principal rulings: (1) that sovereign immunity does not provide a bar to bringing an action against the State of Ohio, (2) that the state is liable by virtue of the doctrine of respondeat superior for the authorized activities of its officers, employees and other agents, and (3) that freedom of individual agents from civil liability arising out of authorized activities for the state is retained. The effects of these rulings are far from obvious, in large part because of the confused prior state of the law upon which they are engrafted. Furthermore, the grounds given for abrogation of the state's immunity to suit can be subjected to severe criticism.

The issue of sovereign immunity provides the advocate with a fertile field from which he can harvest judicial pronouncements supporting a vast range of assertions as to its meaning and effect, and not infrequently opposing advocates can select contradictory statements from the same opinion.[5] The adjudicator's task is not so easily rewarded. He must attempt either to fashion out of, or to lay over, this quagmire of confusion a decision not itself muddy with uncertainty.

The root of the dificulty is that the doctrine of sovereign immunity has been variously held to be: (1) a procedural bar to bringing an action against the state (or its subsidiary agencies and subdivisions) unless properly consented to, i.e. a lack of general jurisdiction of the courts to hear an action or enforce service of process against the state or its subsidiaries;[6] (2) a substantive rule of law providing that the state and its subsidiaries are not liable for damages which are either the inevitable or the accidental result of state-authorized activities;[7] and (3) both a procedural bar to action against the state and a substantive rule of non-liability of the state for harm resulting from its operations.[8] Qualifications, exceptions, extensions and outright contradictions abound as to all three basic statements of the doctrine.[8a]

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[4] Krause v. State, 28 Ohio App. 2d 1,—N.E. 2d—(1971).

[5] Hack v. City of Salem, 174 Ohio St. 383, 189 N.E. 2d. 857 (1963); Board of Educ. v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905); Dunn v. Agricultural Soc'y., 46 Ohio St. 93, 18 N.E. 496 (1888). *See also* Bailey v. City of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842); Borchard, *Government Liability in Tort,* 34 YALE L. J. 1, 129, 229 (1924-25); Borchard, *Governmental Responsibility in Tort,* 36 YALE L.J. 1, 757, 1039 (1926-27); Lawyer, *Birth and Death of Governmental Immunity,* 15 CLEV.-MAR. L. REV. 529 (1966); and Schultz, *Comment-Ohio Sovereign Immunity: Long Lives the King,* 28 OHIO ST. L.J. 75 (1967).

[6] West Park Shopping Center v. Masheter, 6 Ohio St. 2d 142, 216 N.E. 2d 761 (1966); Wilson v. Cincinnati, 172 Ohio St. 303, 175 N.E. 2d 725 (1961); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917).

[7] Wayman v. Board of Educ. 5 Ohio St. 2d 248, 215 N.E.2d 394 (1966).

[8] Board of Educ. v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905). *Cf.* Smith v. State, 227 N.Y. 405, 125 N.E. 841 (1920).

[8a] "Procedural" is used here rather loosely; jurisdiction is a substantive question. Schaffer v. Board of Trustees of Veterans Memorial, 171 Ohio St. 228, 229, 168 N.E.2d 547, 548 (1960).

Board of Education v. Volk,[9] for example, holds that a board of education is not liable to adjoining property owners for injuries to their buildings resulting from excavation on school land despite valid statutory consent to sue boards of education and statutory liability of land owners causing such injuries. The court held that the board was created and authorized to hold property and to expend public funds only for the advancement of education; that the commission of torts, even if incidental to that purpose, was not within the scope of its authority; and hence that no liability could be found. But the same opinion quoted, with obvious approval, a statement of the prolific Judge Cooley that, while liability attaches to the state for its wrongs, no remedy is provided unless there is a valid consent to suit and the opinion also suggested that the board might have been enjoinable upon timely petition. The ultra vires argument is rather out of fashion, but the result and the confusion of rationalization are not. Nonetheless, and aside from questions of terminology, it seems clear that both the procedural jurisdiction issue and the substantive liability issue are recognized by Ohio courts.[10]

The abolition of the doctrine of sovereign immunity asserted in paragraphs 2 and 3 of the court's syllabus, while not absolutely unambiguous in themselves, appear clearly to refer to the procedural bar to actions against the state when the majority opinion is read with them. Thus the majority gives three grounds for its decision that the state is not immune from suit even in the absence of express and unequivocal consent to sue or waiver of immunity, namely (1) that such immunity violates the equal protection and due process clauses of the fourteenth amendment to the United States Constitution; (2) that in fact valid Ohio statutes can and should be read to give general consent to sue the state, as authorized by the constitution of Ohio; and (3) that, in exercise of its independent power to alter the rule of immunity from suit, the court finds that no just and rational public interest is served by that rule to counterbalance the unfair burden of state-sponsored injury which operation of the rule leaves without remedy. A fourth ground for the abolition of immunity is given a forceful and apparently novel exposition in the majority opinion, but reliance upon it is ultimately disclaimed. This ground is that the Ohio constitution itself contains a general consent to sue the state, effective without any requirement of legislative implementation. With the possible exception of the purely judicial abolition argument, each of these four findings is in direct conflict with explicit holdings in applicable cases by the appropriate court of last resort.

In *Palmer v. Ohio*[11] the United States Supreme Court held that the right of an individual to sue a state in either a state or a federal court

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[9] 72 Ohio St. 469, 74 N.E. 646 (1905).
[10] Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959).
[11] 248 U.S. 32 (1918).

must arise from consent of the state, which consent is to be construed according to state law since no federal question is involved. The Ohio Supreme Court had found no authority to bring the action against the State of Ohio for damage caused by overflow from its canal and had affirmed the granting of a motion to quash service of process upon the state. It is certainly true that in the fifty-odd years since *Palmer*, the Supreme Court's handling of contentions that various state actions are not permissible by virtue of the fourteenth amendment has sustained great changes, resulting in massive expansion of the areas where states may not rule with unbridled discrimination,[12] and that Court may welcome an opportunity to review this particular branch of state action which does not appear to have been directly presented to it recently.[13] Without speculating explicitly upon the outcome of such a review, it seems beyond argument that the state (and its subsidiaries) has at least some legitimate interests unlike those of any private corporation or individual and that at least some of those interests would be to some extent served by a policy of limiting the power to bring suit under at least some circumstances and with respect to some potential parties. A reversal of the presumption of immunity—i.e. a finding that a general rule of state immunity from suit, with perhaps express exceptions, is not compatible with the equal protection and due process clauses, but that limited rules of immunity whose precise and limited purposes may be subjected to effective judicial scrutiny do not so offend—might provide an appropriate and flexible means of balancing state and individual interests consonant with modern concepts of federal-state-private relationships.

The finding of the court that effective consent to suit had been given by the statutes creating and defining the general jurisdiction of Ohio courts[14] contravenes two well-settled principles of statutory construction. These are that both statutes in derogation of the common law[15] and those asserted to control and affect the actions and liabilities of the state[16] are to be strictly construed. Since the court expressly holds the doctrine of state immunity from suit to be court-made and since it is certainly reading those statutes to control and affect the operations and obligations of the state, it presumably must find explicit inclusion of the parties it is removing from the protection of the doctrine in the coverage of the jurisdictional statutes it reads to authorize suits otherwise barred by the doctrine of immunity. But by its own admission the majority finds only general language, merely

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[12] Baker v. Carr, 369 U.S. 186 (1962).

[13] *See* Parden v. Terminal Ry. of Ala. State Docks Dept., 377 U.S. 184, 194 (1964). *But see* Corbean v. Board of Educ., 366 F.2d 480 (6th Cir. 1966), *cert. denied* 385 U.S. 1041 (1967).

[14] *E.g.*, OHIO REV. CODE ANN. §§ 2307.01, 2305.1 (Page Supp. 1970).

[15] Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917); Ray v. Board of Trustees of Trenton Twp., 49 Ohio App. 172, 195 N.E. 707 (1934).

[16] State *ex rel* Parrott v. Board of Public Works, 36 Ohio St. 409 (1881); State *ex rel* Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947); Palumbo v. Industrial Comm'n., 140 Ohio St. 54, 42 N.E. 2d 766 (1942).

not exclusive of the state or its subsidiaries, in those statutes. And on many occasions even statutes apparently giving express authorization to sue particular subsidiaries have been so narrowly read as to defeat that apparent authorization.[17] Neither the majority opinion nor the dissent mentions these principles of statutory construction.

Although a court ordinarily has the power to alter or strike down a rule of law which exists only by court sanction, it will usually be reluctant to do so where, as here, the rule is of long standing and carries overtones of legislative reliance upon its existence in that numerous statutes granting limited consent to suit have been enacted.[17a] The dissent points out that in *Palumbo v. Industrial Commission*[18] it was stated that even where an express statutory consent to suit existed, the suit could not be allowed because no directions as to what court could hear the case and upon what officer service of process could be made were given in the statute, and the courts could not supply those omissions because the constitution authorized only the legislature and not the courts to make those determinations. It is perhaps arguable that the wording of article I, section 16[19] can be read to include court-made as well as legislature-made regulation of actions, but it is at least as arguable that the majority determination that the courts may strike down this particular rule of their own making is in direct conflict with the controlling holding in *Palumbo,* for the questions of jurisdiction and particularly of service determinative there are certainly at issue on this appeal.

The finding that article I, section 16 of the Ohio constitution as amended in 1912 is itself a complete and effective manisfestation of the state's consent to be sued is directly contradicted by *Raudabaugh v. State*[20] which has been followed by numerous subsequent cases. In *Raudabaugh-Palmer* it was held that the constitutional authorization merely empowered the legislature to give such consent to sue the state and under such regulations as it saw fit. The court there pointed out that essentially identical language in the California and Tennessee constitutions and very similar wording in many other state constitutions had, at the time of the 1912 constitutional convention and ratification, long been authoritatively interpreted to be not self-executing. The court there presumed that the framers of the amendment were aware of those precedents,[20a] implying that if they had

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[17] Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959); Board of Educ. v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905).

[17a] Schaffer v. Board of Trustees of Veterans Memorial, 171 Ohio St. 228, 168 N.E.2d 547 (1960).

[18] 140 Ohio St. 54, 42 N.E.2d 766 (1942).

[19] "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law." (Second sentence added in 1912).

[20] 96 Ohio St. 513, 118 N.E. 102 (1917), decided by the Supreme Court of Ohio in the same opinion as Palmer v. Ohio, *aff'd.* 248 U.S. 32 (1918).

[20a] Raudabaugh v. State, 96 Ohio St. 513, 516, 118 N.E. 102, 103 (1917).

proposed to effect a different result, they would have adopted other language.

No reference to the actual content of the discussion and debate of the constitutional convention of 1912 is apparent in decisions previous to *Krause*. The majority in *Krause* quotes at length from the report of those proceedings to support its finding that the intent of the delegates in proposing by an overwhelming majority[21] the ultimately adopted amendment was that it constitute in itself complete authority to sue the state. A reading of the entire report of the debates on that proposed amendment leaves this writer somewhat better supplied with quotations supporting the view that self-execution was contemplated than the view that only authorization of implementation by the legislature was intended. Thus ". . . its denial of the old-time notion that the state or sovereign can not be amenable to the suit of a citizen without its consent, . . ."[22] and "Let the humblest citizen feel that . . . he is the equal of the sovereign before the law"[23] as opposed to "The legislature ought to have a right to provide by law for the adjustment of controversies between its citizens and the state. That is the purpose of the proposal."[24]

Whatever the delegates may have known about the provisions and interpretation of the constitutions of other states (and there were in fact references to some of these),[25] they left no doubt that they were aware that it was common practice for the legislature in Ohio to enact special consent for particular suits.[26] Thus perhaps the most persuasive conclusion that can be drawn is that the delegates intended to make some change in the then existing situation. But it also seems that they were more interested in the result than in the procedure for achieving it. Of course, appeal to "legislative" history and the afterwards perceived intent of the delegates is only proper if the language of the provision being interpreted is subject to more than one reading[27] under the principle that constitutions, unlike statutes, are to be liberally construed in favor of a citizen as against the state.[28]

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[21] By 88 to 6, 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1960 (1912). There was a preliminary vote of 71 to 12, *id.* at 1919.

[22] *Id.* at 1431.

[23] *Id.*

[24] *Id.* at 1919.

[25] *Id.* at 1431.

[26] *Id.* The writer has been unable in the short time between the entering of the *Krause* decision and the publication deadline of this issue, to find any Ohio cases treating state tort liability under private consent acts, but Seely v. State, 11 Ohio 501 (1842), *aff'd.* on rehearing 12 Ohio 496 (1843), a contract case in which an ad hoc jurisprudence was adopted involving liberal violations of the parol evidence rule, suggests that this might be a good source of unorthodox precedents.

[27] State *ex rel* Harbage v. Ferguson, 68 Ohio App. 189, 36 N.E.2d 500 (1941), *appeal dismissed*, 138 Ohio St. 617, N.E.2d 544 (1941).

[28] Board of Elections v. State *ex rel* Schneider, 128 Ohio St. 273, 191 N.E. 115 (1934); Hockett v. State Liquor Lic. Bd., 91 Ohio St. 176, 110 N.E. 485 (1915). *See also* State *ex rel* Russell v. Bliss, 156 Ohio St. 147, 101 N.E.2d 289 (1951).

The official explanation, mailed with the text of the proposed amendment to every elector, said that ". . . it will authorize individuals to bring suit against the state . . . in such courts and in such manner as may be provided by law." A. FOOTE, PROPOSED AMENDMENTS TO THE CONSTITUTION OF OHIO 15 (1912).

The existence of a substantive branch of the sovereign immunity doctrine is demonstrated by the many cases finding no cause of action to be stated in a complaint against the state where there was consent to sue and the allegations would have made out a good cause of action against a private party, although certainly many of those decisions do not label their holdings "sovereign immunity."[29] It is, of course, one of the classic functions of tort law to balance the interest of the defendant in engaging in the activity which led to the injury complained of against the risk of harm incident to such activity, and the state and its subsidiaries do have some interests which are different from those of private parties. This is true even where the activities engaged in are also sometimes engaged in by private parties. Those interests peculiar to governmental entities most frequently alluded to as worthy of protection are (1) the preservation of the freedom of its officers, employees and other agents from harassment by frequent suits and from the threat of personal liability so that they may guide their performance of their authorized functions by pursuit of the general public welfare rather than by avoidance of litigation[30] and (2) the prevention of dissipation of public revenues in payment of claims which do not advance the public purposes for which taxes were levied, under the control of local juries which, at least with respect to the state itself if not also its subdivisions, are sometimes supposed to be prone to deciding that little justification is required for effecting the return of some of that revenue to the local private economy.[31]

The frustrating complexities and contradictions produced through the case by case elucidation of the distinctions between "governmental" and "proprietary" activities and between "discretionary" and "ministerial" functions and between "mandatory" and "optional" duties are too well documented to require rehearsal here.[32] Ohio courts have been reluctant to find the state or its subsidiaries liable for injuries caused by their agents in the course of performing authorized functions, even where those functions are arguably ministerial, not discretionary, and performed in connection with arguably proprietary, not governmental, activities.[33] Such distinctions are, however,

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[29] Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E. 2d 475 (1959); Board of Educ. v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905).

[30] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

[31] Board of Educ. v. Volk, 72 Ohio St. 469, 74 N.E. 646 (1905); 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 1919 (1912).

[32] Hack v. Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963).

[33] Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E. 2d 475 (1959); Conrad v. Board of Educ., 29 Ohio App. 317, 163 N.E. 567 (1928); Broughton v. Cleveland, 167 Ohio St. 29, 146 N.E. 2d 301 (1958); Hack v. Salem, 174 Ohio St. 383, 189 N.E. 2d 857 (1963). The situation appears to be as follows: As to torts arising out of the conduct of governmental activities, neither the state nor a municipal corporation is liable. Municipal corporations are held liable for torts arising out of the conduct of proprietary activities, but very few municipal activities are found to be proprietary. Whether the state would be liable for torts arising out of its proprietary activities has not been determined since all tort suits where consent to sue has been found appear to have involved governmental activities.

employed in Ohio, as elsewhere, in adjudicating the personal liability of officers, employees and other agents of the state and its subsidiaries.[34]

The holding in *Krause* that the state is to be subject to the operation of the doctrine of respondeat superior in determining its liability for the torts of its agents would thus appear to bring to bear this whole body of distinctions, previously applicable to the agent personally, upon the issue of the state's liability. And that is not unreasonable, since those distinctions have in fact been drawn, however imperfectly, to protect the interests of the general public, as embodied in the state and its subsidiaries, and not to protect the personal interests of the agents. The balancing of interests as a normal part of tort litigation is perhaps the strongest argument, although not explicitly advanced in the *Krause* opinion, in support of the court's decision to strike down the procedural bar of sovereign immunity, since the interests of the state should be adequately protected by the ordinary principles of tort law without the indiscriminate suppression of the interests of the injured party implicit in the operation of the procedural bar.

What appears at first to be a straightforward and desirable, albeit revolutionary, extension of respondeat superior to create state liability in some circumstances where it would not previously have been found, is transformed into a revolution upon a revolution by the concurrent holding that immunity from civil liability is to be retained as to the agents. The use of the word "retention" in paragraph 4 of the syllabus strongly implies that state liability is being authorized by way of the respondeat superior holding for actions which formerly would not have been found to place liability upon the agent. This implication is explicitly confirmed in the opinion:

> . . .[T]here is no reason in logic for exempting a state from a response in damages to private persons injured by the *discretionary* and authorized acts o[f] agents of the state even though agents may be immune. For there are logical reasons, such as encouraging "unflinching discharge of duty," to justify immunizing an agent's exercise of *discretion* which do not logically extend to the innoculation of the state against the consequences of well-intentioned, authorized, but tortious and damaging acts of state agents. The agents need to perform their authorized duties in an uninhibited manner but the state does not need to avoid the responsibility in tort for the consequences of the agents' damaging acts. It can well afford to respond and in justice should.[35] [Emphasis added.]

Unless the court meant to adopt a rule of universal strict liability for the state, it appears to have opened up a whole new area of jurisprudence in which the scope of the liability of the state for the discre-

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[34] Brinkman v. Drolesbaugh, 97 Ohio St. 171, 119 N.E. 451 (1918); Reckman v. Keiter, 109 Ohio App. 81, 164 N.E.2d 448 (1959); Stine v. Atkinson, 69 Ohio App. 529, 44 N.E.2d 372 (1942).

[35] Krause v. State, 28 Ohio App. 1, 8, —N.E. 2d—, —— (1971).

tionary acts of its agents will have to be determined. Many questions, which previously would not have received serious hearing could, under this holding, be presented. For example, would the state be liable for the failure of the General Assembly to appropriate sufficient funds to keep the state highways in safe condition or for defamation by a judge in the course of proceedings in his court?[36]

It was to be expected that the events at Kent State in the spring of 1970 would produce litigation which would subject the judicial system as well as other parts of the established order of society to penetrating re-examination. Few could have anticipated the far-reaching changes announced by this decision, which must challenge the record for the number of controlling precedents that would have to be abandoned to sustain it in its entirety.

The court was undoubtedly speaking for the people of Ohio in broadening the remedy for injuries resulting from operations of the state and its subsidiaries.[37] The difficulties it encountered in that attempt suggest that the General Assembly would serve the people well by exercising its own more flexible authority in this field.

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[36] The majority opinion does quote with approval Muskopf v. Corning Hosp. Dist., 55 Cal.2d 211, 359 P.2d 457, 462 (1961) and *therein* the dissent in Dalehite v. United States, 346 U.S. 15, 57 (1953) to the effect that the basic decisions of government policy are not tortious.

[37] The amendment to article I, section 16 of the Ohio constitution was adopted by a popular vote of 306,764 to 216,634. J. MERCER, OHIO LEGISLATIVE HISTORY 1909-1913, at 450 (19).