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Constitutional Law

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the accident. The claims were filed too late and were therefore rejected. The Shelbys and Tripp then obtained the appointment of an ancillary administrator in Vinton County. The only claim of property in that county arose from the fact that Wilcox had liability insurance and that the insurance company, of Washington, D. C., was obligated to defend the decedent in case an action was brought against him in Vinton County, and to indemnify him in the event of a judgment against him. In holding that the motion to dissolve the ancillary administration should have been granted, the court made short work of the above argument. The Shelbys and Tripp, said the court, did not bring an action in Vinton County while Wilcox was alive, and they could not do so after his death because the provisions for substituted service against a nonresident motorist do not extend to the personal representative of a deceased nonresident. Thus, the insurance company had no obligation to Wilcox in Vinton County, and he cannot be said to have died leaving property there.

FLETCHER R. ANDREWS

CONSTITUTIONAL LAW

Constitutional litigation in 1956 emphasized the adjustments of property rights — zoning, licensing, vested rights — as well as procedural due process issues.

That zoning cases proved exceptionally active was reflected in one judge's opinion by the words:

> Not in the history of our nation has there been a decade equal to the last decade in expansion of travel, industry and common interests or in the decentralization of what theretofore had seemed to be centrally and permanently fixed in the core of metropolitan centers. Public officials must recognize these movements and courts, in passing judgment on the conduct of such officials, must be permitted, to some extent, to take judicial notice of them.[1]

Individual zoning problems presented difficulty in balancing between the police power of public health, safety, morals and general welfare and the property rights of land owners. An attempt to extend a residential district to include commercial property of long standing was held invalid when 93% of the land value of the commercial property lay in underlying minerals, while topography and surrounding circumstances made residential use exceedingly doubtful.[2] Zoning ordinances were held valid,

[1] Partain v. Brooklyn, 138 N.E.2d 180, 185 (Ohio C.P. 1955) (Blythin, J.)

[2] Cleveland Builders Supply Co. v. Garfield Heights, 136 N.E.2d 105 (Ohio App. 1956).

however, in two similar situations: changing from retail business to multifamily dwellings where vacant land was involved (but unconstitutional as to business establishment already present),[3] and from dwelling house classification to industrial use where the parcel contained 61 acres adjoining a railroad with residences on only one side and the neighborhood rapidly changing in character.[4]

Two zoning ordinances sought absolute prohibitions of land use: one prohibited trailer or cabin camps in a township; the other banned churches or temples in a single family residential district. The former was held constitutional;[5] the latter unconstitutional.[6] Undoubtedly the invalidity of the latter was influenced by the fact that the single family residential district classification also permitted farms, nursery, truck gardens or non-commercial greenhouses under the ordinance. If the zoning use allows for caring of the soil it must also grant the right to care for the soul.

The power to license is an effective control of use of property. To require a license to conduct a "distress merchandise sale" or "going out of business sale" was held not per se unreasonable or unconstitutional.[7] To file an application for a liquor permit grants no vested right to the permit, and thus a subsequent "freeze" on the issuance of permits does not affect the license seeker unconstitutionally.[8] To suspend a driver's license after the licensee was adjudged bankrupt and failed to pay an unsatisfied judgment arising out of the accident which led to the license suspension is constitutional.[9] This action does not supersede the Federal Bankruptcy Act; neither does it contravene the fourteenth amendment nor any Ohio constitutional provision.

No invalidity attached to the inheritance statute which prescribed that adopted children shall be treated as natural children and shall cease to be treated as the children of the natural parents for intestate succession, even when applied to children adopted prior to the statute's enactment. No vested right to inheritance existed until the death of the estate owner which followed the enactment.[10]

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[3] Curtiss v. Cleveland, 130 N.E.2d 342 (Ohio App. 1955)

[4] Partain v. Brooklyn, 138 N.E.2d 180 (Ohio C.P. 1955).

[5] Davis v. McPherson, 132 N.E.2d 626 (Ohio App. 1955), *appeal dismissed,* 164 Ohio St. 296, 130 N.E.2d 342 (1955) and 164 Ohio St. 375, 130 N.E.2d 794 (1955).

[6] Young Israel Organization v. Dworkin, 133 N.E.2d 174 (Ohio App. 1956)

[7] Foltzer v. Cincinnati, 100 Ohio App. 546, 137 N.E.2d 523 (1956)

[8] Scharff v. Board of Liquor Control, 99 Ohio App. 139, 131 N.E.2d 844 (1955)

[9] Smith v. Hayes, 133 N.E.2d 443 (Ohio C.P. 1955).

[10] *In re* Millward's Estate, 136 N.E.2d 649 (Ohio App. 1956), construing OHIO REV. CODE § 3107.13.

The major case in the procedural due process area, *State v. Morgan*,[11] found the Supreme Court divided 4-3. The Ohio Un-American Activities Committee conducted hearings into subversive activities. Statutory immunity for statements made was granted to all witnesses by Ohio. The majority construed Mrs. Morgan's refusal to answer as the proper basis for criminal action. In doing so the majority concluded that the Commission was a committee of the General Assembly, that the refusal to testify can be determined by language which the Commission might reasonably understand as an attempt to invoke the privilege against self-incrimination, that the witness can be required to answer under criminal penalty where an immunity statute protects him from Ohio prosecution although not from federal prosecution, and that the Commission need not direct the witness to answer before criminal liability attaches. One dissenting judge contended that the witness could claim the fifth amendment privilege of the Federal Constitution. The second dissenter pointed out that on the Commission's record the chairman had directed Mrs. Morgan that she could exercise the privilege against self-incrimination which she proceeded to do, and furthermore she was never directed to answer under pain of criminal penalty. The final dissenter concluded that the Commission was not a General Assembly committee, so the immunity statute was not applicable and the witness could exercise her privilege against self-incrimination.

Two civil service cases presented invalid procedural items violating due process. To hold a mass hearing of 17 police officers of different ranks before the Civil Service Commission, where no conspiracy or joint acts were charged but merely gross neglect of duty, denied due process.[12] Also it violated due process to remove a police officer charged with conduct unbecoming an officer when the accused employee received no copy of the order and reasons for removal.[13]

Other procedural due process issues are found in several decisions. A business purchaser has the duty to determine if the seller owes accrued sales tax and to withhold such sum from the purchase price. Failure to receive notice of the assessment hearing or to be made a party to the hearing does not violate due process.[14] A dissenting minority of three Supreme Court judges would require the state to proceed against the purchaser and directly submit evidence as to the tax due in a full prosecution, rather than merely apply the assessment determined against the seller.

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[11] 164 Ohio St. 529, 133 N.E.2d 104 (1956). Appeal is now pending in the United States Supreme Court.

[12] Zimmerman v. Cleveland, 130 N.E.2d 401 (Ohio App. 1955).

[13] Owens v. Ackerman, 136 N.E.2d 93 (Ohio App. 1955).

[14] State v. Sloan, 164 Ohio St. 579, 132 N.E. 2d 460 (1956).

Another notice requirement — that in cases of voluntary dissolution notice must be given to all directors of a corporation and such other persons as the court deems proper — was held not to violate procedural due process.[15] All statutory procedural steps were held to be required in appropriation of land for highway purposes by the Director of Highways, otherwise the landowners would be deprived of property without due process of law.[16]

Interesting but not unusual due process cases determined: that the term "moral turpitude" was not unconstitutionally vague in a disbarment statute;[17] and that a justice of the peace was disqualified from trying a person where the justice's income was dependent on the costs assessed only upon conviction, and the same conviction also violated due process where no evidence was heard.[18]

Four other constitutional cases in 1956 should be noted. In *Fletcher v. Coney Island*,[19] a Negro sought to enjoin a private amusement park operator from practicing racial discrimination in admission of customers. The majority of the court denied the remedy, concluding that the General Assembly had not contemplated injunctive relief under the Ohio Civil Rights Act, only criminal prosecution and civil penalty. In the absence of statutory authority, the majority relied on common law which permits private places of amusement to discriminate racially in admitting customers. The two dissenting judges contended that the decision failed to protect the plaintiff's civil rights. To interpret the statute as narrowly as did the majority would permit a person to violate the Civil Rights Act with only the mere chance of criminal prosecution or civil penalty attaching.

Nudists, seeking to file non-profit incorporation articles, can be constitutionally denied this right for the obscenity statute prohibiting two or more persons of the opposite sex over 18 years old from exposing private parts is a valid exercise of the police power, regardless of the belief of those desiring to practice nudism as a doctrine of life, cult or sect.[20]

The Supreme Court also held valid against the challenge of retroactive legislation an amendment requiring that no person be eligible for nomina-

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[15]Hollywood Television Service v. Picture Waves, 136 N.E.2d 617 (Ohio App. 1954)

[16] *In re* Appropriation of Easement for Highway Purposes, 99 Ohio App. 251, 132 N.E.2d 247 (1954).

[17] *In re* Prentice, 132 N.E.2d 634 (Ohio App. 1953) This case is also discussed in the ATTORNEYS section, *supra.*

[18] *In re* Tullius, 137 N.E.2d 312 (Ohio Prob. 1955)

[19] 165 Ohio St. 150, 134 N.E.2d 371 (1956). This decision is also discussed in the EQUITY section, *infra.*

[20] State *ex rel.* Church v. Brown, 165 Ohio St. 31, 133 N.E.2d 333 (1956).