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## Constitutional Law

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## CONSTITUTIONAL LAW

The bulk of interesting decisions in the constitutional field during 1955 involved the time-honored due process of law issue. Procedural and substantive problems in this area presented some fresh grain for the old mill.

The method of conducting a hearing was under fire in two widely divergent cases. A municipal Civil Service Commission ordered a police chief removed from office. At the hearing upon which the order was based the chief was not permitted to deny under oath the specific charges brought against him. This denial was a violation of due process of law and the commission's order was reversed.<sup>1</sup> Another type of hearing, conducted by the State Fire Marshal in the manner of a private investigation to determine the cause of a fire, permitted a lower due process of law standard. The marshal could call a witness to testify without benefit of counsel. Refusal to testify legally supported a contempt imprisonment even under a habeas corpus attack.<sup>2</sup> This type of hearing is permitted under the fourteenth amendment to the United States Constitution and Article 1, section 10 of the Ohio Constitution. It is an investigatory hearing only and not an order-producing hearing. Even under such an investigatory hearing, however, the witness cannot be compelled to testify. He may assert his privilege against self incrimination if first sworn.

In another case, however, the privilege against self incrimination was denied. A person who failed to answer a question of the Ohio Un-American Activities Commission cannot plead the protection of the fifth amendment of the United States Constitution. In the first place this protection only applies against the federal government. No state constitutional right was involved, for a state statute provided the witness immunity from prosecution if he answered the questions. Ohio need not be concerned with the possibility of another sovereign power, like the federal government, using the witness' answers to proceed against him criminally. A contempt conviction for failure to answer was therefore held to be constitutional.<sup>3</sup>

The constitutional authority for an administrative tribunal (State Board of Real Estate Examiners) to revoke the license of a real estate broker was upheld even where the Board made additional findings of fact other than those alleged in the complaint. It was not a denial of due process to make such findings and to include them in the revocation order.<sup>4</sup>

<sup>1</sup> *Smith v. City of Mayfield Heights*, 124 N.E.2d 761 (Ohio App. 1955).

<sup>2</sup> *In re Groban*, 164 Ohio St. 26, 128 N.E.2d 106 (1955).

<sup>3</sup> *State v. Arnold*, 124 N.E.2d 473 (Ohio Com. Pl. 1954).

<sup>4</sup> *Meneley v. Carpenter*, 129 N.E.2d 516 (Ohio App. 1954).

The Board in such action had acted within the standards established by the legislature.

The retroactive effect of judicial decisions which overrule prior decisions was also considered from the due process point of view last year. An application for a certificate of abatement of claimed overpayment of franchise taxes was validly denied.<sup>5</sup> The applicant had relied on a judicial decision which was subsequently overruled in another case. Where no showing was made of any rights vesting in the applicant prior to the overruling decision, procedural due process was accorded in denying the application for abatement. Furthermore the equal protection clause of the fourteenth amendment was not violated, for this clause does not assume uniformity in judicial decisions.

An unusual procedural issue involving a plea of guilty was also considered in 1955. The accused at first pleaded guilty, and the court duly journalized the plea. Then the court, on defendants' motion, vacated the plea and permitted the accused persons to plead not guilty. Thereafter the court vacated the not guilty plea, reestablishing the prior plea of guilty. No consent of the defendants made in open court was obtained for this last court action. This action was held to be illegal, a violation of the defendants' right to due process of law.<sup>6</sup>

Substantive due process issues clustered primarily about the "petty larceny of the police power." Property rights were constitutionally taken from a person under a zoning regulation when mandamus was denied to compel a building commissioner to issue a permit. The zoning ordinance required forty feet of frontage on a street before a building could be erected on a lot. The petitioner had acquired two tracts adjacent to his original lot. These two tracts had no frontage on any street. In fact, because of a ravine, no street could be constructed on which these two lots could have frontage. To deny a construction permit because the zoning provisions were not met was held not to deny due process under the fourteenth amendment nor to constitute an illegal taking of property under sections 1, 16 and 19 of Article I of the Ohio Constitution.<sup>7</sup> Furthermore it was held not to be a violation of the protection of property envisaged under the due process clause for the legislature to make the parent or the parent's estate liable for the support of an adult child who is an inmate of the state hospital for the mentally ill.<sup>8</sup>

Two decisions reported in 1955 did protect property from an illegal taking under the due process clause. A zoning ordinance which restricted

<sup>5</sup> *The Peerless Electric Co. v. Bowers*, 164 Ohio St. 467, 129 N.E.2d 467 (1955).

<sup>6</sup> *State v. Evola*, 130 N.E.2d 166 (Ohio App. 1955).

<sup>7</sup> *State ex rel. Jack v. Russell*, 162 Ohio St. 281, 123 N.E.2d 261 (1954).

<sup>8</sup> *State v. Webber*, 163 Ohio St. 598, 128 N.E.2d 3 (1955).

to residence use land located on the corner of two heavily traveled highways where other corners were zoned for commercial use was held to have no reasonable relation to public health and welfare under the state's police power. Such zoning violated the fourteenth amendment due process provision, for the land had "little suitability" for residence use.<sup>9</sup> An ordinance authorizing confiscation of pinball machines which register a score was also held unconstitutional.<sup>10</sup> Gambling devices per se can be confiscated; operation of pinball machines can be made illegal. To confiscate property such as pinball machines which are not in themselves gambling devices, however, is too extreme and violates the property protection contemplated under due process of law.

The traditional liberties expressed in the first amendment to the United States Constitution were scrutinized at the highest and lowest levels of the Ohio judicial hierarchy last year. The Supreme Court had little difficulty in sustaining municipal legislation for fluoridation of the public water supply. To prevent dental caries was considered a public health purpose. Individual freedom, religious or otherwise, contemplated by the first amendment and the fourteenth amendment would not be violated. Prior exercise of the state's police power in areas of venereal disease, blood tests for marriage, sterilization of mental defectives, pasteurization of milk and chlorination of water had opened the path for the current public health program involving fluoride in the water supply. A taxpayer's suit to enjoin fluoridation was denied.<sup>11</sup> The common pleas court wrestled with the constitutionality of movie censorship which continues to be a volatile public matter. By denying motion picture interests an injunction to restrain movie censorship the court relied on the traditionally broad discretion given to equity courts as courts of conscience.<sup>12</sup> The court held that the motion picture interests have legal rights but these alone were not enough to move equity to act. The court faced the confusing constitutional status presented by the United States Supreme Court decisions. In *Burstyn Inc. v. Wilson*<sup>13</sup> the New York state movie censorship law which prohibited "sacrilegious" films was held unconstitutional by the nation's highest tribunal. In the following year, the Ohio Supreme Court in *Superior Films Inc. v. Department of Education*<sup>14</sup> upheld Ohio's movie censorship law which required films to be moral, educational or amusing and harmless. On appeal to the United States Supreme Court this decision was

<sup>9</sup> *State ex rel. Euverard v. Miller*, 129 N.E.2d 209 (Ohio App. 1954).

<sup>10</sup> *Ferguson v. City of Columbus*, 128 N.E.2d 198 (Ohio App. 1954).

<sup>11</sup> *Krause v. City of Cleveland*, 163 Ohio St. 559, 127 N.E.2d 609 (1955).

<sup>12</sup> *R.K.O. Pictures v. Hisson*, 123 N.E.2d 441 (Ohio Com. Pl. 1954).

<sup>13</sup> 343 U.S. 495 (1952).

<sup>14</sup> 159 Ohio St. 315, 112 N.E.2d 311 (1953).

reversed *per curiam* on the authority of the *Burstyn* case.<sup>15</sup> The common pleas court refused to accept the implication that the United States Supreme Court had held unconstitutional Ohio's movie censorship law. It stated:

This court cannot accede to the proposition of law that an express decision of the Supreme Court of Ohio can be overruled by implication. If the United States Supreme Court desires to overrule a decision of the Supreme Court of Ohio, a sovereign state, let it so declare in express terms such intention.<sup>16</sup>

The separation of powers among the three branches of government was reemphasized theoretically again last year. In practical operation the court acknowledged the paramount right of a court of general jurisdiction to occupy space in the courthouse essential for the proper and efficient operation of the court. To dispossess offices of the legislative or executive function, however, the court must demonstrate that additional space is reasonably necessary, not merely desirable.<sup>17</sup>

Two cases held that the legislature improperly delegated authority to administrative officers because no standards or criteria were established which the officers could follow. One of these cases proved most controversial. A municipal zoning ordinance allowed a gasoline station in a retail business district only upon condition that a variance permit be obtained from the zoning Board of Appeals. A majority of four judges held this provision unconstitutional because of the failure to establish standards and denied the mandamus action for a variance permit.<sup>18</sup> Three judges dissented and contended that the decision was in conflict with a prior decision which had upheld a similar zoning ordinance. This prior ordinance in a different municipality permitted the Board of Appeals to grant a variance permit where "practical difficulties or unnecessary hardship" would result to the property.<sup>19</sup> One of the dissenters in the instant case would have denied the mandamus action because the plaintiff had an adequate equitable remedy. In the second case involving an improper delegation of authority it was held invalid to give power to a state hospital administrator to admit or not to admit a mental patient of seventy years or over without any standards being established.<sup>20</sup>

Specific issues concerning the Ohio constitution faced the courts in three instances last year. The right of a common pleas judge to hold

<sup>15</sup> 346 U.S. 587 (1954).

<sup>16</sup> *R.K.O. Pictures v. Hisson*, 123 N.E.2d 444, 446 (Ohio Com. Pl. 1954).

<sup>17</sup> *State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57 (1955).

<sup>18</sup> *State ex rel. Selected Properties Inc. v. Gottfried*, 163 Ohio St. 469, 127 N.E.2d 371 (1955).

<sup>19</sup> *The L. & M. Investment Co. v. Cutler*, 125 Ohio St. 12, 180 N.E. 379 (1932).

<sup>20</sup> *State ex rel. Songer v. Baber*, 97 Ohio App. 501, 127 N.E.2d 538 (1954).