SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 9 | Issue 3 Article 9

1958

Constitutional Law

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Ohio was free to consider whether changed conditions necessitated a modified decree. This represents the general rule as set forth in the Restatement.[25]

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CONSTITUTIONAL LAW

A most controversial constitutional issue of our day is freedom of the press v. obscenity. In the past year the Supreme Court of the United States has rendered at least five important decisions seeking to resolve the issues involved.[1] Ohio judicial decisions have not been so numerous. To encompass the subject effectively, decisions by state courts are vital in our federal system where the United States judiciary places only the outer limits on state action through the fourteenth amendment. Last year the Municipal Court of Cincinnati made a major contribution in this field. A municipal ordinance punished the sale of obscene pictures. The court applied specific rules to the complexities of obscenity in *City of Cincinnati v. Walton.*[2] The basic quality of obscenity is literature or pictures which have a prurient interest or as Judge Bettman expressed it, "Dirt for dirt's sake" — a good sentence to remember for a jury charge on this issue. But added to this quality must also be a substantial tendency for the material to excite lustful desires. The judge or jury, whichever has the fact decision to make concerning obscenity, should follow these guides. In the instant case pictures of nude women in seductive poses with their pubic areas averted or covered were held not to be obscene by these tests for no substantial tendency to excite a normal adult was produced. For the same reason neither are pictures containing both nude men and women not posed suggestively. A magazine should not be judged as a whole where allegedly obscene stories are unrelated. Each story and picture can be judged individually. A book must be viewed as a whole to determine its obscene qualities. To decide a general obscenity charge on the basis of its affect on minors would violate the fourteenth amendment, the court held. Laws specifically drafted to protect minors are necessary to avoid this constitutional pitfall.

Another court protected freedom of the press when it reversed a newspaper editor's contempt guilt for publishing a juvenile's name after

[25] RESTATEMENT, CONFLICT OF LAWS § 147, comment *a* (1934). The important case of New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947) holds that under the full faith and credit clause a second state may modify the custody decree of a first state insofar as the decree is subject to modification by the law of the first state. In other words, the second state is not obliged to give more faith and credit to the decree than it has in the rendering state.

conviction and commitment of the delinquent. Knowledge by the editor of a court order prohibiting such publication was not proved. Furthermore, the statute barring name publication applies only when the juvenile is referred for probation.[3]

State decisions involving personal conduct and liberties were several last year. A police officer cannot be fired for insubordination in violating a department rule which prohibits policemen from parking on the public streets in space by custom, not law, reserved for adjacent businessmen. A citizen had the right to park there. The police officer didn't lose his right because he was a policeman.[4] A railroad engineer was convicted for producing unnecessary noises in a certain residential area at a certain time. No proof was offered that more than the ordinary noise produced by a railroad existed. The railroad was a prior, non-conforming use in the area. The municipal ordinance was constitutional; its application to defendant in this case, however, was invalid. The conviction was reversed.[5] Nor can the employing corporation be criminally convicted for train operation which results in noise from the customary use of its property. In an industrially zoned area with large industrial investments, to apply a municipal ordinance prohibiting unreasonably loud and disturbing noises violates the fourteenth amendment as an illegal taking of property.[6]

State police power control over economic matters was considered in several instances. An automobile agency was licensed by the state board to sell trucks and used cars only. It sold new cars in violation of its license and a board rule that required a contract between the dealer and manufacturer before new cars could be sold. The licensing board's rule requiring the contract was held to violate Article I Sec. 1 of the Ohio Constitution and the fourteenth amendment of the Federal Constitution. Creation of a special monopoly privilege, lack of uniformity and denial

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[1] Roth v. U.S., 354 U.S. 476 (1957) (obscenity not protected by first amendment so postal authority of Congress can be used to punish for mailing obscene literature); Alberts v. California, 354 U.S. 476 (1957) (punishment for sale of obscene literature by state not violative of fourteenth amendment); Kingsley Books Inc. v. Brown, 354 U.S. 436 (1957) (state can enjoin obscene literature from sale provided there is a hearing and decision on the obscenity issue within several days' time); One Inc. v. Olesen, 26 L.W. 3203 (1958) (per curiam, reversal of judgment of court of appeals order granting mail ban on homosexual magazine as obscene in 241 E.2d 772); Sunshine Book Co. v. Summerfield, 26 L.W. 3203 (1958) (per curiam, reversal of judgment of court of appeals order granting mail ban on nudist magazine in 26 L.W. 2169).

[2] 145 N.E. 2d 407 (Ohio Munic. Ct. 1957).

[3] State v. Sherow, 101 Ohio App. 169, 138 N.E. 2d 444 (1956).

[4] Roller v. Stocklein, 143 N.E. 2d 181 (Ohio C.P. 1957).

[5] City of Hamilton v. Hausenbein, 102 Ohio App. 566, 139 N.E. 2d 459 (1956).

[6] City of Euclid v. General Motors Corp., 140 N.E. 2d 435 (Ohio Ct. App. 1957).

of the right to follow a lawful pursuit were the reasons.[7] However, it is constitutional to subject automobile dealers to forfeiture of their license when they violate the Retail Installment Sales Act.[8] Designed to correct abuses in dealer participation in installment financing, the act limits the premium for transfer of an installment contract to a maximum of two per cent of the principal contract amount. A dissenting opinion considered this provision an unreasonable regulation of the right to contract, especially since the state licensing board could control somewhat this practice through disclosure provisions.

The Sunday closing law again withstood the challenge of constitutionality in 1957.[9]

Zoning again produced a large bulk of cases. Zoning legislation was held unconstitutional in the following areas: reclassification to residential use solely to relieve the shortage of safe and sanitary housing in the city generally of part of a 30-year-old industrial area in which only several industries had been established[10]; the prohibition of a trailer park in a sparsely settled, undeveloped, rural village where the owner purchased and partially developed the park at a cost of $20,500 before the zoning ordinance was enacted;[11] the prohibition of strip mining on a run-down farm valued at $17,000 exclusive of the coal, and $1,000,000 with the coal, two miles from a built-up area and 300 yards from an operating strip mine in a neighboring township taking coal from the same vein;[12] the attempt to apply the zoning plan to quarry operations in the interim between its adoption by township trustees and approval or rejection by the voters.[13] One zoning ordinance did withstand constitutional assault. An ordinance requiring a building permit for light manufacturing, storage and offices in a two-family residence area where the only non-conforming use is a short spur railroad was upheld when petitioner failed to prove the lack of relationship between the zoning plan and the police power.[14] An attempt to indicate future changes was dismissed. The court must rely on existing facts in zoning issues.

Equal protection of the laws with its reasonable classification corollary challenged the Supreme Court in Ohio on four occasions. One case,

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[7] Ohio Motor Vehicle Dealers' and Salesmen's Licensing Board v. Memphis Auto Sales, 103 Ohio App. 347, 142 N.E. 2d 268 (1957).

[8] Teegarden v. Foley, 166 Ohio St. 449, 143 N.E. 2d 824 (1957).

[9] State v. Ullner, 143 N.E. 2d 849 (Ohio Ct. App. 1957).

[10] White v. City of Cincinnati, 101 Ohio App. 160, 138 N.E. 2d 412 (1956).

[11] Kessler v. Smith, 142 N.E. 2d 231 (Ohio Ct. App. 1957).

[12] East Fairfield Coal Co. v. Booth, 166 Ohio St. 379, 143 N.E. 2d 309 (1957).

[13] Henn v. Universal Atlas Cement Co., 144 N.E. 2d 917 (Ohio C.P. 1957).

[14] Krieger v. City of Cleveland, 143 N.E. 2d 142 (Ohio Ct. App. 1957).

Richter Concrete Corp. v. City of Reading[15] presented an unconstitutional classification. To bar through traffic vehicles over 20,000 lbs. gross weight, unless on state highways, loading or unloading on the street in question, or traveling to or from the place of registry, discriminates invalidly against non-residents in violation of Article I Sec. 2 of the Ohio Constitution and the fourteenth amendment. A dissent was registered on the basis of *City of Xenia v. Schmidt*[16] where a municipal ordinance prohibiting obstructions in the street but applying only to temporary, non-permanent objects was held a valid classification. Ohio's controversial axle mile tax with its classification was held valid when applied to a Michigan trailer in interstate commerce. The tax was imposed on trucks with three or more axles in a graduated scale from one-half cent to two and one-half cents a mile. The exemption of two-axle trucks and the graduated scale were reasonable classifications when both inter-state and intra-state vehicles were treated equally.[17]

To exclude police and fire officers, when retired, from workmen's compensation if employed by a city but not a village was also valid.[18]

An unusual aspect of the equal protection issue arose in *Allied Stores of Ohio v. Bowers*.[19] Originally a tax was applied to all merchandise or agricultural products stored in the state. A later amendment withdrew such property if owned by a non-resident. A resident taxpayer sought to bar the application of the tax to him for its violation of the reasonable classification requirement. The court agreed it was an unconstitutional classification. The tribunal refused, however, to strike out this amendment because it would be too severe an alteration of legislative intent. The resident's tax was constitutional regardless.

Cases involving procedural due process in 1957 involved primarily the right to a hearing. A non-resident, confined ward can terminate the appointment of his resident guardian where the ward received no personal service and was given no opportunity to be heard at the appointment proceedings.[20] A telephone customer was granted a temporary mandatory injunction to compel reinstallation of his telephone after police removed it for alleged book making activity. Since no opportunity was given the customer to defend against the police accusations he was

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[15] 166 Ohio St. 279, 142 N.E. 2d 525 (1957).

[16] 101 Ohio St. 437, 130 N.E. 24 (1920).

[17] George F. Alger Co. v. Bowers, 166 Ohio St. 427, 143 N.E. 2d 835 (1957).

[18] State *ex rel.* Van Lieu v. Industrial Commission, 165 Ohio St. 545, 138 N.E. 2d 301 (1956).

[19] 166 Ohio St. 116, 140 N.E. 2d 411 (1957).

[20] *In re* Guardianship of Reynolds, 103 Ohio App. 102, 144 N.E. 2d 501 (1956).

denied due process.[21] However, it is not invalid by statute to declare a sheriff's post vacant without a hearing if the sheriff be absent 90 days except for sickness, injury or active military service.[22]

Right to counsel is another important procedural due process requirement. A person indicted for burglary who enters a plea of guilty before the court has advised him of his right to counsel has not been accorded due process; his conviction must be reversed.[23] When a counsel has represented an accused, a clear showing of incompetence or conduct so negligent as to deny a fair trial must be produced to obtain freedom in a habeas corpus proceeding.[24] Generally the trial judge has full responsibility to assure this protection.

The interstate commerce clause was held to be violated once last year. An ordinance limiting the speed of all freight trains to 12 miles per hour in a city and to eight miles per hour at grade crossings was held unconstitutional as applied to the particular crossing at the time in question.[25] The interstate commerce issue was enmeshed in a wrongful death action in which the only negligence alleged was the violation of this ordinance.

An amendment to the adoption law to give the adopted child the death beneficiary rights of a natural child can be constitutionally applied to a child adopted before its passage where the death occurred after the amendment became effective.[26]

The Supreme Court of Ohio grappled with the state's constitutional amendment procedure in *Leah v. Brown*.[27] The Senate voted on a House resolution for constitutional change which the Senate committee had amended. The Senate journal contained the original House resolution with only "as amended" indicated. The Court enjoined submission of this constitutional issue to the voters. The constitution expressly requires that the amended resolution be fully spread upon the journal. Since this constitutional amendment procedure is a special legislative power, strict compliance with Article XVI Sec. 1 is required. Two judges dissented and followed syllabus 2 in *Ritzman v. Campbell*,[28] which required the court to accept, as properly passed, an enrolled bill authenticated and at-

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[21] Leffer v. Cincinnati and Suburban Bell Telephone Co., 144 N.E. 2d 158 (Ohio C.P. 1957).

[22] State *ex rel.* Trago v. Evans, 166 Ohio St. 269, 141 N.E. 2d 665 (1957).

[23] State v. Porcaro, 102 Ohio App. 128, 141 N.E. 2d 482 (1956).

[24] Kramer v. Alvis, 103 Ohio App. 324, 141 N.E. 2d 489 (1956).

[25] *In re* Estate of Millward, 166 Ohio St. 243, 141 N.E. 2d 462 (1957).

[26] Banks v. Baltimore and Ohio R.R., 145 N.E. 2d 350 (Ohio C.P. 1957).

[27] 167 Ohio St. 1, 145 N.E. 2d 525 (1957).

[28] 93 Ohio St. 246, 112 N.E. 2d 591 (1915).