Denver Law Review

Volume 26 | Issue 2 Article 6

January 1949

Current Decisions in Constitutional Law

Dicta Editorial Board

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EDITOR'S NOTE—With this issue, DICTA presents this new feature which Mr. Sherman graciously has consented to write each month, always providing there is sufficient interesting grist for the mill. Mr. Sherman, in addition to being an active practitioner, serves as lecturer on Constitutional Law at the University of Denver College of Law and is, therefore, eminently qualified to handle the subject. He will attempt to keep you abreast of interesting and significant decisions in both the Federal and state courts.

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State Prohibition of Closed Shop Held Constitutional—

In a series of significant decisions, the Supreme Court measured the constitutional validity of the prohibition by the states of Nebraska, Arizona and North Carolina of the closed shop and of closed shop contracts by constitutional or statutory measures and held that they did not conflict with the Federal Constitution. The Supreme Court ruled that prohibition of the closed shop did not interfere with freedom of speech, assembly or petition which guarantees did not extend to exclude non-union workers from employment in order to aid the bargaining position of a union. The court further held that these state provisions were not an unconstitutional impairment of the obligations of existing contracts or a denial of equal protection of the laws. The majority opinion written by Justice Black and presuming to follow the philosophy of the *Nebbia, Parish, Darby* and *Phelps-Dodge* cases, answered the contention that due process had been violated by the retort that states have power to legislate against what are found to be injurious practices in their internal, commercial and business affairs. They are not to be put in a straight jacket by judicial construction when they seek the suppression of those conditions which they regard as offensive to the public welfare. "Just as we have held that the Due Process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers."

The decisions foreshadow validity of the closed shop provisions of the Taft-Hartley Law and it would seem that the fight on behalf of labor to validate the closed shop must now be on the political front.

An interesting reservation to the decision is found in the concurring opinion of Justices Rutledge and Murphy in one of the cases. Their opinion reserves the question whether a state may constitutionally foreclose the right to strike by making illegal the refusal of union members to work with non-union members and does not pass upon the question of whether a state may enjoin such a strike. *(Lincoln Federal Labor Union, A. F. of L. v. North-*

western Iron and Metal Company, et al; Whitaker v. State of North Carolina; American Federation of Labor v. American Sash and Door Company, 69 S. Ct. 251-268.)

A State May Constitutionally Forbid Women From Being Barmaids—

Although the Supreme Court of the United States has not yet been called upon to measure the validity of a state statute which would frustrate the barfly or circumscribe his liberty, in *Goesaert v. Cleary,* 69 S. Ct. 198, it was confronted with a question whether Michigan could forbid females from being barmaids and at the same time make an exception of the wives and daughters of the owners of liquor establishments. The court held that equal protection of the laws and due process did not bar Michigan from forbidding bartending by women and at the same time allowing the wives and daughters of the owners to engage in this pursuit. To paraphrase the court, it cannot be said that there is no rationale justifying the manner in which the Michigan legislature has answered its moral and social problems. They may have drawn a line which is not without a basis in reason. It is for Michigan to decide whether it shall withdraw from women the occupation of bartending and yet allow them to serve as waitresses where liquor is dispensed. It is also within their province whether the wives and daughters of owners of liquor establishments shall be allowed to engage in bartending. Three Judges, however, (Rutledge, Douglas and Murphy) thought the statute one which arbitrarily discriminates between male and female owners of liquor establishments. The decision is significant in Colorado, however, where a somewhat similar statute has been presented to the legislature for passage.

The Right to Privacy and Unlawful Search and Seizure—

The guarantees of the 4th amendment regarding unreasonable searches and seizures are again dissected and defined in *McDonald v. United States,* 69 S. Ct. 191. Here the defendant had been under surveillance by the police for about two months. He was observed entering a rooming house where he had rented a room. There was no warrant for his arrest, nor a search warrant. While outside the house one of the police thought he heard an adding machine. Believing that a "numbers game" was in progress, one of the officers opened a window leading into the land-lady's room and climbed through. The other officers followed. They proceeded to the second floor and one of the officers stood on a chair and looked through a transom. He observed the defendants as well as numbers slips, money and adding machines. The defendants were thereupon arrested. The court held that this evidence should have been suppressed where offered in a Federal court. The guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. The officers were not responding to an emergency. There were not exceptional circumstances to justify a search without a warrant. The defendant was not fleeing nor was the property in

process of destruction. The inconvenience of the officers and the delay in procuring a search warrant does not justify violating the constitutional requirement. (The Chief Justice, Justices Burton and Reed dissented).

The practitioner also might well note the recent decision of the United States Supreme Court in the case of *Upshaw v. U. S.*, 69 S.Ct. 170. Though the holding in this case is expressly not placed on constitutional grounds, the defendant was convicted of grand larceny in a United States District Court and sought to exclude confessions of guilt which were admitted against his objection that they have been illegally obtained. The confessions had been made during a 30 hour period while defendant was held a prisoner after police had arrested him on suspicion and without a warrant. The defendant's objection to the admissibility of the confessions rested on Rule 5(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. and the ruling in the *NcNabb* case, 63 S.Ct. 608. The court held that the practice of arresting, holding and questioning a person on mere suspicion, although in accordance with usual police procedures, is in violation of law and confessions thus obtained are inadmissible. .(four justices dissenting).

The Constitutional Right to Counsel—

Does the due process clause of the 14th amendment or the 5th amendment require counsel for all persons charged with serious crimes? In *Eveges v. Commonwealth of Pennsylvania,* 69 S.Ct. 184, the court considered this Federal constitutional question as to denial of counsel. The defendant, 17 years of age, was faced with four indictments charging four separate burglaries. He pleaded guilty and thereafter petitioned for a writ of habeas corpus alleging, among other things, that he was not informed of his right to counsel nor was counsel offered him at any time during the period between arrest and conviction. The record showed no attempt on the part of the trial court to make him understand the consequences of his plea nor was he advised of his right to counsel. The court held that the opportunity to have counsel was a necessary element of a fair hearing and reversed the conviction.

The opinion reveals an interesting conflict among the justices as to the true rule. For some, whenever a serious offense is charged the failure of the court to offer counsel in state criminal trials, deprives an accused of rights under the 14th amendment. For the others, when a crime subject to capital punishment is not involved, each case depends upon its own facts such as the gravity of the crime, the age and education of the defendant, the conduct of the court, etc.—all the circumstances which in the nature of the case might result in injustice without the aid of counsel.

Unlawful Delegation of Powers—

A law providing for compulsory arbitration of labor disputes arising in public utilities or hospitals by a board, of which a circuit judge of a state is the chairman, with the power to make binding determination of the issues

involved, was held unconstitutional in Michigan upon the sole issue that it was an attempt to confer non-judicial powers and duties upon a judicial officer, duties, *Local 170 Transport Workers Union of America v. Gabola,* 34 NW 2d 71. The court intimated that compulsory arbitration of labor disputes in the area of public utilities and hospitals may, under police power, be constitutionally permissible. Neverthless the court held that the act as written violated an independent judiciary.

Miscegenation—Freedom of the Press—

Two other interesting state court decisions.—(1) In *Perez v. Lippold,* 198 P. 2d 17, the California Supreme Court held that the California miscegenation law declaring illegal the marriage of white persons and Negroes, Mongolians and members of the Malay race, was unconstitutional. One should compare this decision with the decision of the Colorado Supreme Court, *Jackson v. City and County of Denver,* 109 Colorado 196.

(2) A Wisconsin court balanced the police power of the state in providing punishment for publishing in a newspaper or periodical the identity of a female who may have been criminally assaulted or raped as against the contention that such punishment violated the freedom of the press. The court favored the exercise of such police power as a greater social value under the circumstances of the case. *State v. Evjue,* 33 NW 2d 305.

Time Extended on Essay Contest

Final date for submission of essays on Administrative Law of Colorado has been extended to September 1, 1949, by American Bar Association, Section of Administrative Law. Time within which contestants must be elected to membership in the American Bar Association to qualify in the contest has been extended to August 1, 1949.

Contest prizes are $150.00 to the Colorado lawyer submitting the best essay on Colorado Administrative Law, awarded by the Colorado Bar Association, and $1000.00 for the best essay submitted from any state, awarded by the American Bar Association.

The rules for the contest and instructions on where to submit the essays were published in DICTA, May 1948 issue. Further information may be had from Milton J. Keegan, Colorado chairman, 1210 First National Bank Bldg., Denver.

Pleasant President of Northwestern Bar

SIDNEY PLEASANT of Craig recently was elected president of the Northwestern Bar Association, and Worth Shrimpton was designated as secretary-treasurer.

BERTON T. GOBBLE, former assistant attorney general and inheritance tax commissioner, has become associated in law practice with C. Henry Anderson at Brush. Mr. Anderson also was formerly an assistant attorney general.