Maryland Law Review

Volume 23 | Issue 4 Article 8

Recent Decisions

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Administrative Law — Requirement Of Notice And Hearing On Telephone Co. Tariffs. *Bird v. Chesapeake and Potomac Tel. Co.*, 185 A. 2d 917 (Mun. Ct. App. D.C. 1962). Appellant sued the telephone company for the allegedly negligent omission of his name and number from the alphabetical telephone directory. The Municipal Court restricted appellant's recovery to $39 under a limitation of liability, tariff provision, previously approved by the Public Utilities Commission without notice and hearing. Appellant contended that the Commission's approval of the limiting provision was invalid because such limitation operated as a rate increase, which could be granted only after notice and a hearing. The D.C. Municipal Court of Appeals, basing its decision on statutory construction of the word "rate", *held* that the statutory requirements binding on the Commission as to regulation of the basic rate, *viz.* notice and hearing, were inapplicable to regulations having only a minor and indirect effect on the company's financial operation.

The Maryland Public Service Commission Law, unlike the D.C. statute, broadly defines the word "rate", 7 MD. CODE (1957) Art. 78, § 2(q). Although the definition of the word "rate" in the Maryland Public Service Commission Law appears broad enough to include this type of tariff provision, the statutory procedure for establishing or changing rates, 7 MD. CODE (1957) Art. 78, §§ 68, 69, 70, does not require notice and public hearing before such a rate change *can* become effective. For a general reference see: Oppenheimer, *Administrative Law in Maryland*, 2 Md. L. Rev. 185, 203 (1938).

Constitutional Law — Commitment Of Drug Addict To Rehabilitation Center Does Not Constitute Cruel And Unusual Punishment. *In Re De La O,* 28 Cal. Rptr. 489, 378 P. 2d 793 (1963). Petitioner was charged with violation of a California statute making unlawful use of and addiction to narcotics a misdemeanor, Cal. Health and Safety Code § 11721; a statute which, two weeks subsequent thereto, was ruled unconstitutional by the United States Supreme Court in *Robinson v. California,* 370 U.S. 660 (1962). Thereafter the municipal court pursuant to Cal. Penal Code § 6450 suspended the criminal proceedings and certified petitioner to the superior court for a hearing to determine the extent of his addiction. The court adjudged petitioner an addict and committed him to the custody of the Director of Corrections to be confined in California's Rehabilitation Center for a maximum of five years in compliance with § 6450. The present action was brought in the Supreme Court of California on an order to show cause issued upon application for writ of habeas corpus, the petitioner contending that the statute, pursuant to which he was committed, was unconstitutional within the meaning of *Robinson v. California.* In the *Robinson* case, the United States Supreme Court found that § 11721, as construed by the California courts, made the status or condition of being a narcotic addict a crime. The Supreme Court of the United States held that such condition could be considered only as an illness, not a crime, and the criminal penalty of a minimum of 90 days imprisonment imposed by § 11721 constituted a cruel and unusual punishment in violation of the Fourth Amendment. The Court, however, recognized the power of a state to regulate narcotic drug traffic within its borders and to establish a *civil procedure* providing for a compulsory treatment of narcotic addicts which might require periods of involuntary confinement and penal sanctions for non-compliance with treatment procedure. In the instant case, the California Supreme Court, after analyzing the statute, § 6450, *held:* that despite its location in the Penal Code and its inter-relationship with the Welfare and Institutions Code, the inherent civil aspects of the program established under this statute outweighed the external indicia of criminality, and, therefore, that petitioner's commitment and confinement did not constitute cruel and unusual punishment within the meaning of the *Robinson* case.

In Maryland, if a person charged with a criminal offense is found upon pre-sentence investigation by the probation staff and court psychiatrist to be addicted to narcotics, he may be committed to a state mental hospital for treatment

and observation. 2 MD. CODE (1957—Cum. Supp. 1962), Art. 16, § 49. The commitment is under the direct control of the court and must be made by a judge of the Supreme Bench of Baltimore City or a Circuit Court judge of a county. For additional reference see: ABA-AMA JOINT COMMITTEE ON NARCOTIC DRUGS, DRUG ADDICTION: CRIME OR DISEASE? (1961); ELDRIDGE, NARCOTICS AND THE LAW (1st ed. 1962); MODEL PENAL CODE (Prop. Off. Draft 1962) § 6.13; SCHUR, NARCOTIC ADDICTION IN BRITAIN AND AMERICA (1962).

Evidence — Illegally Obtained Evidence Inadmissible In A Civil Suit After Mapp v. Ohio, 367 U.S. 643 (1961). *Peters v. Rosetti,* 31 L.W. 1121, 31 L.W. 2396 (N.Y. City Civ. Ct. 1963). Plaintiff was a guest in an apartment which was forcibly entered by police officers without a warrant. The officers searched the apartment, seized numbers policy slips from the occupants, and $1982 in cash from the plaintiff. Subsequently, plaintiff pleaded guilty to a criminal felony charge — the possession of policy slips. After police refusal to return the money, plaintiff sued in replevin. Under New York replevin procedure, plaintiff has the burden of proving lawful title to property used for a lawful purpose before he can demand a return of property seized by the police. The New York City Civil Court concluded that if the testimony of the police officer who had seized the money in the unlawful raid was inadmissible, the money could not be connected with the illegal policy slips and plaintiff had carried the above mentioned burden of proof. Ruling that the exclusionary rule of *Mapp v. Ohio,* 367 U.S. 643 (1961) was applicable to this evidence, tarnished by an illegal search and seizure, the Court held that the money should be returned to the plaintiff.

Prior to *Mapp,* state courts, both with and without the exclusionary rule in criminal cases, consistently admitted illegally obtained evidence in civil suits, *United States v. One 1953 Oldsmobile Sedan,* 132 F. Supp. 14 (W.D. Ark. 1955), and *Jackson v. State,* 251 Ala. 226, 36 So. 2d 306 (1948). Whether or not *Mapp* requires that the exclusionary rule be applied in state civil cases, as this court did, remains an open question. See: *Lebel v. Swincicki,* 354 Mich. 427, 93 N.W. 2d 281 (1958); Note, *Evidence Obtained By Unreasonable Search Excluded From Civil Suit,* 8 Utah L. Rev. 84 (1962); Note, *Evidence Illegally Obtained By Private Persons Held Admissible In State Civil Action,* 63 Col. L. R. 168 (1963) and Note, *Admissibility of Illegally Obtained Evidence In A Civil Case,* 17 Wash. & Lee L. R. 155 (1960).

Insurance — Construction Of Life Policy Purchased From Vending Machine. *Steven v. Fidelity and Casualty Co. of New York,* 27 Cal. Rptr. 172, 377 P. 2d 284 (1962). The deceased purchased a round-trip airplane ticket, in which part of the original itinerary called for a connecting flight from Terre Haute, Indiana to Chicago, Illinois. He then purchased a standard life insurance policy from a vending machine and according to its directions mailed it to the beneficiary, his wife, who is the appellant. The policy contained over 2,000 words of fine print which deceased had no chance to read before the required mailing and which attempted to limit coverage by several "inconspicuous" clauses. It stated that the coverage was applicable only for travel on "scheduled air carriers" and that it covered substituted emergency transportation necessitated by an interruption of the scheduled air carrier's service if the insured was riding in a land conveyance. Deceased's scheduled flight to Chicago was cancelled and the local agent aided deceased and two others in arranging a substitute flight by an air taxi service. This flight crashed and beneficiary brought this action against the insurer.

The Supreme Court of California found that these limiting clauses were ambiguous in that they did not make it clear that such an arranged air taxi service was not scheduled, and in that they did not specify whether or not the coverage for substitutions was limited to land conveyances and excluded all else. The Court also found that under such a standardized contract purchased from a vending machine a passenger could reasonably have expected coverage for the whole trip, including reasonable substituted transportation, and that the insurer should have plainly and clearly brought to passenger's attention that insurer did not extend such coverage. Relying on this construction of the contract, the public policy considerations whereby ambiguities in policies are to be interpreted against the insurer, and the consideration that limiting or exclusionary clauses in such standardized contracts are not enforceable in the absence of plain and clear notification to the public, the Court reversed and held for the appellant beneficiary. See: 25 A.L.R. 2d 1025 (1952); *Rosen v. Fidelity and Casualty Co. of New York,* 162 F. Supp. 211 (E.D. Pa. 1958); *Lachs v. Fidelity & Casualty Co. of New York,* 306 N.Y. 357, 118 N.E. 2d 555 (1954) and *Fidelity and Casualty Co. of New York v. Commander,* 231 F. 2d 347 (4th Cir. 1956).

Mortgages — Reasonable Time To Produce Legal Tender In Cash Sale. *First Federal Savings & Loan Ass'n of Dallas v. Sharp,* 359 S.W. 2d 902 (Tex. 1962). Mortgaged real estate was to be hold under a deed of trust providing that sale was to be made "to the highest bidder for cash." Plaintiff, who was the purchaser of mortgagor's interest, made the highest bid at the deed of trust sale. A personal check was offered by plaintiff's agent and refused. The agent then requested a few moments to produce legal tender. The trustee refused and sold to the next highest and only other bidder, the defendant mortgagee. The trial court decreed that defendant's deed be cancelled and the trustee be ordered to execute and deliver to plaintiff a trustee's deed to the property. The Texas Supreme Court, after construing a special verdict of the jury to mean that it found plaintiff would have produced the cash in a reasonable time within the normal business hours of sale, affirmed the trial court and *held* that the plaintiff was entitled to a reasonable time within which to produce the legal tender and that refusal of trustee to allow such time was unreasonable and arbitrary. Three judges dissented, arguing that sale under a power of sale in a trust deed must strictly comply with the terms of that power.

In Maryland the rules governing foreclosure of mortgages also apply to sales under deeds of trust. See MD. RULE W77 and also Hubbard, *Deeds of Trust and Article 66, Section 24, of the Maryland Code,* 13 Md. L. Rev. 114 (1953). Maryland Rule W74(d)(1) states that any sale of property under such a power of sale "shall be made upon such terms as to payment as are provided in the mortgage, or, if no terms as to payment are provided in the mortgage, then the sale shall be made upon such terms as are reasonable under the circumstances." What result this rule would produce in Maryland in a similar case is undetermined. However, 59 C.J.S. 959, Mortgages, § 572 states that, "sale under a power in a mortgage or deed of trust must be conducted in strict compliance with the terms of that power. . . ." For further reference see: 15 M.L.E. 396, Mortgages, § 236; 37 Am. Jur. 143, Mortgages, § 703; *McConneaughey v. Bogardus,* 106 Ill. 321 (1883); and 2 WILTSIE, REAL PROPERTY MORTGAGE FORECLOSURE (5th ed. 1939) § 669, p. 1081.

Process — Non Resident Amenable To Substituted Service Of Process For Acts Done In Maryland. *Baltimore Lumber Co. v. Marcus,* 208 F. Supp. 852 (D. Md. 1962).

Plaintiff brought an action for breach of contract against defendant resident of Pennsylvania and others. Service of process was made by registered mail on the defendant Marcus in accordance with the provisions of 7 MD. CODE (1957) Art. 75, § 78. On defendant's motion to dismiss the action or in the alternative to quash return of service, the Court found as a fact and concluded as a matter of law that defendant Marcus incurred a personal liability to plaintiff for material supplied by plaintiff for a construction undertaking in Maryland when defendant solicited the contract in Maryland and represented that he was "behind the business." The Court, on these facts, *held* (1) that the actions of the defendant Marcus met the "minimum contact" requirement for substituted service through the Secretary of State because the defendant had clearly done some business or performed some work within the State of Maryland and, (2) that defendant non-resident was therefore subject to such substituted service of process. In reaching its decision the Court was required to interpret and apply 7 MD. CODE (1957) Art. 75, § 78, which is applicable, *inter alia,* to: "Any nonresident, person, firm, partnership, general or limited, *not qualified under the laws of this state as to doing business herein, . . .*" The Court decided that the statutory provision did not authorize this method of substituted service only to nonresident persons, firms and partnerships which are *required* to qualify under some particular state law to do business herein and who have not so qualified; but also to any nonresident persons, firms and partnerships, including those who are not required to qualify but who have done business in the state. The Court characterized Art. 75, § 78 as a "catch-all" for any type of nonresident who met the "minimum contact" requirement but who had not appointed, actually or constructively, an agent upon whom process could be served, whether or not the nonresident was required to appoint such an agent by some specific statute. For further reference see: *Maternity Trousseau Inc. v. Maternity Mart of Baltimore,* 196 F. Supp. 456 (D. Md. 1961); Reiblich, *Jurisdiction of Maryland Courts Over Foreign Corporations Under the Act of 1937,* 3 Md. L. Rev. 35, 70 (1938) and Stimson, *Omnibus Statutes Designed to Secure Jurisdiction Over Out-of-State Defendants,* 48 A.B.A.J. 725, 728 (1962).

Search And Seizure — Prior Determination Of Obscenity By Qualified Person Must Precede Seizure Of Books.

United States v. Peisner, 311 F. 2d 94 (4th Cir. 1962). FBI agents in Maryland, after almost two years of surveillance, believed defendant was transporting obscene books in interstate commerce, although they at no time saw the books, or knew what books were being transported. On the day of the alleged offense, defendant was observed loading his car with packages and heading north from Washington, D.C. On entering New Jersey, defendant's car was stopped by a New Jersey Turnpike policeman, and after several books were found in the back seat and their pages briefly scanned, defendant was arrested for possession of obscene literature. No search warrant had been issued and it appeared from the record that the search, seizure, and arrest had been made, at least in substantial part, because of the information furnished by the FBI, which information pertained solely to possession of books and not to the nature of them. Convicted of violation of 18 U.S.C.A. § 1465 (1955), defendant appealed from a denial of his motion to suppress the seized evidence, contending that in light of the prohibitions of the First and Fourth Amendments there is a more stringent standard of probable cause for the search of books, and that to validate the search and seizure there must have been a prior *judicial* determination of the obscenity of the books. The United States Court of Appeals for the Fourth Circuit, reversing the conviction, *held* that probable cause for believing books are being transported is not sufficient for search and seizure; in addition there must be probable cause for belief that those books are obscene. The court was not prepared to state that prior *judicial* determination of obscenity is required to constitute probable cause for search and seizure, but it did hold that as a minimum requirement it was essential that some qualified individual, aware of the proper test of obscenity as set out in *Roth v. United States*, 354 U.S. 476 (1957), should have made a determination prior to the search and seizure.

The court relied heavily on *Marcus v. Search Warrant*, 367 U.S. 717 (1961), in which a warrant was issued for seizure of specific books, and during the confiscation officers also seized books not specified in the warrant, but which appeared on examination by the officers to be obscene. The Supreme Court held that these search and seizure procedures lacked the safeguards for non-obscene matter provided by the Due Process Clause of the Fourteenth Amendment. In a recent New Jersey case, *State v. Parisi*, 76 N.J. Super. 115, 183 A. 2d 801 (1962), the court *held* that under the state obscenity statute a prior judicial determination

of obscenity was absolutely essential for establishing probable cause for a valid search and seizure of allegedly obscene books. For further reference see Note, *Constitutional Law — Search and Seizure — Procedures For Seizure Of Obscene Publications,* 26 Mo. L. R. 501 (1961).

Taxation — National Bank Liable To State For Failure To Collect Use Tax. *Bank of America National Trust and Saving Association v. State Board of Equalization,* 26 Cal. Rptr. 348 (Dist. Ct. App., 1st Dist., Cal. 1962). Plaintiff, a national bank, brought an action to recover use taxes paid under protest. The bank, as one of its services, made available specially printed personalized checks. Order blanks were given by the bank to its depositors and subsequently forwarded by the bank to DeLuxe Check Printers, a Minnesota corporation, not qualified to do business in California. The printed checks in turn were mailed directly to the depositor and $1.45 was deducted from the depositor's account by the bank, the selling price of the checks including a five cent bank handling charge. The California District Court of Appeals, in affirming application of the use tax to the sale of checkbooks, *held* that the bank was a "retailer," "engaged in the business of making sales" as defined in Cal. Revenue and Taxation Code, § 6015(b). The Court further held, (1) that, as a retailer, the bank could be made an agent of the state, charged with the collection of the use tax, without impairing its function as an instrumentality of the Federal Government and, (2) that by failure to collect the tax, the bank became *indebted* for an equal amount to the state.

The Maryland use tax, although differing from the California tax in terminology, is quite similar in application and legislative intent. Compare, e.g., *Comptroller v. Glenn L. Martin Co.,* 216 Md. 235, 140 A. 2d 288 (1958) with *In Re Los Angeles Lumber Products Co.,* 45 F. Supp. 77 (S.D. Cal. 1942). Under the Maryland Retail Sales Tax Act, 7 MD. CODE (1957) Art. 81, § 324(F)(2), "any production, fabrication or printing of tangible personal property on special order for a consideration," is considered to be a taxable "retail sale." Rule 34 of the rules and regulations promulgated by the Comptroller of Maryland is even more specific, stating, in part, that banks, when ordering imprinted checks for their customers, should be regarded as purchasing the checks for resale and should collect the tax from the persons to whom the checks are resold, 1 CCH State Tax. Rep. Md. ¶ 60-019(E) (1961). For further refer-

ence see *National Bank of Detroit v. Dept. of Revenue,* 340 Mich. 573, 66 N.W. 2d 237 (1954), appeal dismissed 349 U.S. 934 (1955); noted 53 Mich. L. Rev. 988 (1955) and *Farmers and Mechanics-Citizens National Bank of Frederick v. Comptroller,* Daily Record, Oct. 22, 1960 (Cir. Ct. of Fred. County, Md., 1960).

Torts — Defamation By Radio And Television Broadcast Is Actionable Per Se — "Defamacast." *American Broadcasting-Paramount Theatres, Inc. v. Simpson,* 106 Ga. App. 230, 126 S.E. 2d 873 (1962). Plaintiff was one of two Federal prison guards who in 1934 accompanied Alphonse Capone from Atlanta Federal Prison to Alcatraz Federal Prison. In a fictionalized television presentation of that event, one of these guards was represented as having accepted a bribe from the prisoner Capone. The Georgia Court of Appeals in overruling defendant's special demurrers in a defamation suit, *held inter alia,* that the old categories of libel and slander are not directly applicable to defamation by broadcasters and that such defamation should be actionable per se under a new category, "defamacast."

In the United States, some courts have considered radio and television defamation as libel, others as slander, and still others consider it as libel if read from a script and slander if not. PROSSER, TORTS (2d ed. 1955), § 93; 1 HARPER & JAMES, THE LAW OF TORTS (1956), § 5.18 and Annot., 5 A.L.R. 2d 957 (1949). In England, defamation by broadcast has been made libel by statute. Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 66, §§ 1, 9, 16(1). The American Law Institute view is that broadcasting with script is libel, but the same words broadcast without a script can be libel or slander depending on the area of dissemination, the deliberate and premeditated character of the publication, and the persistence of the defamatory conduct. RESTATEMENT, TORTS (1938) § 568, comment (f). The Georgia Court of Appeals, by establishing the new "defamacast" category, can now disregard many of these distinctions between libel and slander as regards radio and television presentations. The need for such a "new tort" theory has also been recognized in *Summit Hotel Co. v. National Broadcasting Co.,* 336 Pa. 182, 8 A. 2d 302 (1939) and in the dissenting opinion in *Kelly v. Hoffman,* 137 N.J.L. 695, 61 A. 2d 143 (Ct. ERR. & APP. N.J. 1948). See Vold, *The Basis for Liability for Defamation by Radio,* 19 Minn. L. R. 611 (1935); 14 M.L.E. 207, Libel and Slander, § 1 *et seq.*