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# Abstracts of Recent Cases

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CONSTITUTIONAL LAW—CENSORSHIP STATUTE—VAGUENESS.—*P*, a licensed distributor of a motion picture, sought an injunction restrain *Ds*, City of Chicago and its officials, from interfering with a general exhibition of the movie. As required by Municipal Code, *P* applied for a permit to show the film and was granted a restricted permit allowing exhibition to persons over twenty-one years of age. Such a limited permit was required by the code if the picture tended to create a harmful impression on the minds of children though adults would not be so affected. *Held*, a motion picture censorship ordinance, permitting a limited exhibition to persons over twenty-one years of age when the picture tends to create a harmful impression on the minds of children and such tendency would not exist if exhibited only to persons of mature age, is invalid as furnishing an insufficient guide to either the censors or those who produce motion pictures. *Paramount Film Distrib. Corp. v. City of Chicago*, 172 F. Supp. 69 (N.D. Ill. 1959).

Obscenity is not within the area of constitutionally protected speech or press. *Roth v. United States*, 354 U.S. 476 (1957). However, under the general rule a censorship statute is not constitutional if it is framed in terms so vague as not to give the censors a rational guide to their decisions. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

A general criminal obcenity statute, involving no prior restraint, may not be couched in terms of standards appropriate for children. *Butler v. Michigan*, 352 U.S. 380 (1957); *Goldstein v. Commonwealth*, 200 Va. 25, 104 S.E.2d 66 (1958); *State v. Miller*, 112 S.E.2d 472 (W. Va. 1960). It should be noted that in basing its decision on the general principle of vagueness, the case does not foreclose the possibility that prior restraints may be validly imposed on differing basis for audiences limited to adults and those which may include children if the standards to be applied are drafted with sufficient precision. *Cf.*, MODEL PENAL CODE § 207.10 (Tent. No. Draft 6, 1957).

The court in the principal case has advanced no new theory but has merely held an ordinance vague, and therefore within the scope of the general rule stated above, since it simply states that a thing may be immoral so far as children are concerned but not as to other groups.

M. J. F.

CRIMINAL LAW—PLEA OF NOLO CONTENDERE IN FELONY CASES.—*D* was indicted for burglary and pleaded not guilty. Two weeks later, by permission of the court, *D* withdrew this plea and entered a plea of nolo contendere, and requested probation. *D* was given an indeterminate sentence of one to fifteen years in the penitentiary. *Held*, in a habeas corpus proceeding, that a person may be sentenced to imprisonment upon a plea of nolo contendere to an indictment for felony in any criminal case in which the death penalty may not be inflicted. A judgment of imprisonment may not be considered or controlled in a habeas corpus proceeding on the ground that it was entered upon such a plea. *State ex rel. Clark v. Adams*, 111 S.E.2d 336 (W. Va. 1959).

Nolo contendere is to be pleaded only by leave of court and it is not available to the accused as a matter of right. *Williams v. State*, 130 Miss. 827, 94 So. 882 (1923). Some few courts do not recognize the plea at all. *State v. Hill*, 145 Kan. 19, 64 P.2d 71 (1937). Where recognized, it is almost unanimously held that the courts cannot accept such a plea to a capital offense punishable by death. *Commonwealth v. Shrope*, 264 Pa 246, 107 A. 729 (1919). The courts seem to be divided where the penalty is imprisonment but the majority of cases follow the generally accepted rule of the federal courts that the plea of nolo contendere does not prevent the court from imprisoning the accused. *Hudson v. United States*, 272 U.S. 451 (1925).

Many state courts, after accepting the plea, limit the punishment to fines, which in essence admits the plea only in cases involving misdemeanors. *Roach v. Commonwealth*, 157 Va. 954, 162 S.E. 50 (1932).

Until the present decision the West Virginia court was allowed to impose a sentence under a plea of nolo contendere in all cases of misdemeanor. *School v. McNinch*, 103 W. Va. 44, 136 S.E. 865 (1927). The allowance of the plea in a felony case in West Virginia seems to be a new concept for the state though it does not set forth any new idea in the criminal field on a national level.

M. J. F.

CONSTITUTIONAL LAW—RESTRICTION ON PASSPORTS—FOREIGN POLICY AS A FACTOR.—Appellant applied for renewal of a passport. The passport contained a restriction which made it invalid for travel to five named areas under Communist control. When appellant was asked whether he would make a commitment to abide by the

restrictions, he declined to do so and renewal was refused. The district court sustained the refusal and the applicant appealed. Held, the power to designate certain areas of the world as forbidden to American travelers falls within the power to conduct foreign affairs. *Worthy v. Herter,* 270 F.2d 905 (D.C. Cir. 1959).

It has been recognized in many decisions that the right to travel, a personal liberty guaranteed by the Constitution, is not absolute and a citizen has a limited right to international travel. *Bauer v. Acheson,* 106 F. Supp. 445 (D.D.C. 1952). In a later case, it was stated that the broad power of the secretary of state to issue passports has generally been considered discretionary in that the refusal of a passport is authorized only when the applicant is not a citizen or a person owing allegiance to the United States, or has been engaging in criminal or unlawful conduct. *Kent v. Dulles,* 357 U.S. 116 (1958). In the present case, the passport renewal refusal was based on political and military conditions in certain areas of the world, and the rational of *Kent v. Dulles* is not applicable.

The principal case sets forth the idea that designation of certain areas of the world as "trouble spots" is a phase of foreign affairs, since such designation requires judgment based on foreign policy and consideration, and deals with a government whose locale is on foreign territory. The court here has distinguished this case from one encompassing a mere passport denial and has placed it in the realm of foreign affairs. Because of this, no other judgment could then be fairly reached, since judgment on what action would best promote foreign relations has been entrusted to the President not the courts. In foreign affairs the President has the power of action and the courts will not attempt to review the merits of his action. *Chicago & Southern Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103 (1947).

M. J. F.

FEDERAL CIVIL PROCEDURE—SERVICE OF PROCESS IN AIRCRAFT OVER A STATE.—In an action by citizens of Arkansas against three *D*s for damages for alleged breach of contract, one *D*, a citizen of Tennessee, was served personally on a non-stop flight from Tennessee to Texas, while the airplane was directly above Pine Bluff, Arkansas. *D*'s motion to quash asserted he had not been properly served within the State of Arkansas. *Held,* a person moving in interstate commerce across the State of Arkansas in regular commercial aircraft, flying in regular navigable airspace above the state,

was within the "territorial limits" of the state, and thus amenable to service under federal rules. *Grace v. MacArthur*, 170 F. Supp. 442 (E.D. Ark. 1959).

Fed. R. Civ. P. 4(f) provides that process may be served anywhere within the territorial limits of the state in which the district court is held.

Federal commerce power over navigable streams will not prevent state action consistant with such power. *Gillman v. Philadelphia*, 70 U.S. (3 Wall.) 782 (1866). Federal acts that regulate air commerce are based on the commerce power of Congress and not on natural ownership of the navigable air space. *Braniff Airways v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590 (1954).

A New York case allowed an action against a party apprehended in the state based on a previous non-stop flight over the western district of New York during which the plane had carried smuggled goods. The court said that, when the airplane crossed the boundary of Canada and proceeded over the western district of New York, it entered that district and gave the court jurisdiction. *United States v. One Pitcairn Biplane*, 11 F.Supp. 24 (W.D. N.Y. 1935).

An airplane in the air over territory of a state is within the state and subject to its sovereign power. *State v. Northwest Airlines*, 213 Minn. 395, 7 N.W.2d 691 (1942).

The preceding cases are different from the one at hand in that they involved state jurisdiction over the aircraft or its cargo rather then the people aboard. With reference to the specific problem herein considered, the principal case appears to be one of first impression. However, the result may readily be justified by reliance of the above cited cases. Air space above a state appears to be within the jurisdiction of the state.

M. J. F.