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Constitutional Law--Privacy--Right of Individual on Public Conveyances

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CASE COMMENTS

CONSTITUTIONAL LAW—PRIVACY—RIGHT OF INDIVIDUAL ON PUBLIC CONVEYANCES.—*P*, public utilities commission, on the protest of *D*, passenger, investigated the use of transit radio receivers on streetcars in Washington, D. C., and determined that such was consistent with public convenience, comfort, and safety. The programs contained music, news, and short commercials. The question is whether such is unconstitutional under the Fifth Amendment as an invasion of the constitutional right of privacy of the passengers. *Held*, on certiorari, reversing the lower court, that the right of privacy “is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance.” *Public Utilities Comm’n v. Pollak*, 72 Sup. Ct. 813 (1952).

Mr. Justice Douglas dissented on the ground that the passengers are on the streetcar from necessity and are a “captive audience”, their attention thereby being compelled, and that such required listening would lead to the control of men’s minds. The problem involves a new phase in the law of privacy, with no precedent, and we must seek the answer from related fields.

Clearly, at common law noise alone may constitute an abatable nuisance. *Baltimore & Potomac R.R. v. Fifth Baptist Church*, 108 U.S. 317 (1883); *Sweetland v. Curtiss Airports Corp.*, 55 F.2d 201 (6th Cir. 1932); *Chicago v. Reuter Bros. Iron Works*, 398 Ill. 202,

75 N.E.2d 355 (1947); *Ritz v. Woman's Club*, 114 W. Va. 675, 173 S.E. 564 (1934). Music, a form of noise, may also become a nuisance enjoicable in equity. *Edmunds v. Duff*, 280 Pa. 385, 124 Atl. 489 (1924); *State v. Turner*, 198 S.C. 487, 18 S.E.2d 372 (1942); *Snyder v. Cabell*, 29 W. Va. 48, 1 S.E. 241 (1887). To be an actionable nuisance, however, such noise (music) must be so excessive and unreasonable as to produce actual physical discomfort and annoyance to persons of ordinary sensibilities; thus, injury to one of high sensitivity would not render the noise abatable, unless the noise were so substantial and unreasonable as to affect the health of an ordinary man. *Kentucky & W. Va. Power Co. v. Anderson*, 288 Ky. 501, 156 S.W.2d 857 (1941); *Meadowbrook Swimming Club v. Albert*, 173 Md. 641, 197 Atl. 146 (1938); *Tortorella v. H. Traiser & Co.*, 284 Mass. 497, 188 N.E. 254 (1933). Admitting, therefore, the right of the property owner to abate noise as a nuisance if it meets the above requirements, is this common law right of such a character as to be protected as a constitutional right of the individual under due process of law? *D* thought there was a deprivation of his liberty because of an unpermitted invasion of his freedom to converse and to meditate.

An ordinance forbidding the use of sound trucks emitting "loud and raucous noises" on public streets has been held constitutional the court there recognizing the right of citizens to some degree of quiet and order needed to carry on their activities, etc. *Kovaks v. Cooper*, 336 U.S. 77 (1949). In *Saia v. New York*, 334 U.S. 558 (1948), where a similar statute was held unconstitutional on its face because of the discretion given to the chief of police in granting permission to use sound devices, such being a previous restraint of the right of free speech, Mr. Justice Frankfurter in his dissent stated: "If uncontrolled [sound amplification], the result is intrusion into cherished privacy . . . surely there is not a constitutional right to force unwilling people to listen." However, in *Martin v. Struthers*, 319 U.S. 141 (1943), a municipal ordinance forbidding persons to summon residents to the door to pass handbills was held unconstitutional as a denial of freedom of speech and press, appellant being a "Jehovah's Witness" distributing advertisements of a religious meeting. The individual's rights are not absolute even in his own home.

Thus, the right of privacy at best is very limited, and the court jealously guards against its invocation to the prejudice of the rights of others as indicated by *Martin v. Struthers, supra*. Applying the doctrine of abatement of noise as a nuisance, we may constructively state that only where the infringement is excessive and unreasonable to a man of ordinary sensibilities will the court consider bringing into play right of privacy. Here, the programs were not unreasonable, and the great majority of passengers found them inoffensive and favored their continuance; *D* does not represent the ordinary man. The holding of the court appears just, considering the rights of all persons involved. In answering Mr. Justice Douglas's objection, if ever control of the mind were threatened, then such would be clearly unreasonable and a valid basis for objection.

G. D. H. S.

CRIMINAL LAW—EFFECT OF PARDON ON HABITUAL CRIMINAL STATUTE.—Habeas corpus proceeding by *P* to obtain release from imprisonment for life for third offense under the habitual criminal statute [W. VA. CODE c. 61, art. 11, §§ 18 and 19 (Michie, 1949)]. *P* claimed that the statute did not apply since, after commission and conviction of first two offenses punishable by confinement in the penitentiary, he was given a pardon by the governor. The circuit court overruled *D*'s demurrer to the petition and, on joint motion of the parties, certified the question to the supreme court. *Held*, that a pardon by the governor of convictions for offenses punishable by confinement in the penitentiary does not exempt the prisoner from increased punishment under the habitual criminal statute. Reversed and remanded. *Dean v. Skeen*, 70 S.E.2d 256 (W. Va. 1952).

This is the first case in West Virginia determining the effect of a *full* pardon on the application of the habitual criminal statute.

In *State v. Fisher*, 123 W. Va. 745, 18 S.E.2d 649 (1941), the court, in dealing with a *conditional* pardon, held that it had no effect upon prior convictions and that the habitual criminal statute applied. The court also expressed the opinion that an unconditional