Note

OT 1960 No. 236

MAPP v. OHIO

Appeal from Ohio Sup. Ct.

Timely

Applt was convicted under § 2905.34 [Ohio Revised Code] which reads in part

> No person shall knowingly . . . have in his possession or under his control [any obscene material] . . . .

Applt argues that if such a legislative prohibition of possession of books is valid, it may discourage law abiding people from even looking at books and thus interfere with the freedom of speech and press guaranteed by the First amd Fourteenth Amendments. This arguement conviced 4 of the 7 justices of the st. ct. byt the Ohio constitution prohibits a finding of unconstitutionality if more than one justice finds it constitutional.

The majority compared this statute to the one involved in Smith v. California, 361 U.S. 147 (1959), in which this Court held invalid a statute which made it

> "unlawful for any person to have in his possession any obscene or indecent writing . . . in any place of business

> where . . . books . . . are sold or kept for sale.

This Court said that

> if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. [361 US 153]

The majority of the Ohio ct. ruled that the word "knowingly" in the statute was not a requirement of scienter because the instant knowledge of the contents of a book was acquired, the crimewas complete. Since a majority of that ct. can construe statutes, this statute has now been construed.and I would agree that, under this construction, there is no real element of scienter. As a result, I think the statute should fall under the Smith ruling.

The majority went on to say that

> [a]s a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded.

Applt also claimed that the books belonged to a roomer who had moved out before his rent was up. Applt admits reading the material

when she packed the tenant's belongings. She claims that if she destroyed the material, she would be liable for malicious destruction of another's property. Applt thus argues that there was no non-criminal course of conduct open to her, in a ~~sitk~~ situation which she did not bring about. This is an appealing argument. Fair play would seem to dictate otherwise.

Applt also claims that the evidence was obtained without a search warrant and that such evidence should be suppresed. However, Ohio, accepts such evidence and the facts here do not appear to bring this case under the ban of the Rochin due process standard. [When the police came to applt's house, she refused them entrance without a search warrant. One officer waived a piece of paper--which turned out not to be a search warrant--and pushed past applt and searched the house.

Applt has other claims concerning indeterminant sentence, the jury charge, etc., but these have little merit.

NOTE PROBABLE JURISDICTION cle

10/12/60