Ross Vs. Oregon

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SooperKanoon Citation : sooperkanoon.com/91664

Court : US Supreme Court

Decided On : Jan-27-1913

Appeal No. : 227 U.S. 150

Appellant : Ross

Respondent : Oregon

Judgement :

Ross v. Oregon - 227 U.S. 150 (1913)
U.S. Supreme Court Ross v. Oregon, 227 U.S. 150 (1913)

Ross v. Oregon

No. 75

Argued December 6, 1912

Decided January 27, 1913

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ERROR TO THE SUPREME COURT

OF THE STATE OF OREGON

SYLLABUS

The prohibition in 10 of Article I of the Constitution against *ex post facto* laws is a restraint upon the legislative power of the states and concerns the making of laws, and not their construction by the courts. While that prohibition is directed against legislative acts, and reaches every form in which the legislative power acts, and while a judicial decision is the act of an instrumentality of the state, if the purpose of that decision is not to prescribe a new law for the future, but only to apply laws in force at the time to completed transactions, the ruling is a judicial, and not a legislative, act, and no federal right or

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question is involved under the *ex post facto* provision of the Constitution.

The purpose of a judicial inquiry is to enforce laws as they are at present; legislation looks to the future and changes existing conditions by making new laws to be applicable hereafter. *Prentis v. Atlantic Coast Line,* 211 U. S. 210 , 211 U. S. 226 .

Whether an amendment to the state constitution requiring prosecution for crime to be based on indictment applies to pending cases is a question of local law, and the decision of the state court is not reviewable here, and the decision of that court that such an amendment did not repeal the statute under which a prosecution based on an information already instituted does not deprive plaintiff in error of his liberty without due process of law under the Fourteenth Amendment of the federal Constitution, and no federal question is involved giving this Court jurisdiction to review the judgment of conviction.

Where the record presents no federal question, the writ of error must be dismissed, and this Court cannot discus the merits of the questions presented and determined in the state court.

Writ of error to review 55 Or. 450 dismissed.

The facts, which involve the jurisdiction of this Court to review judgments of the state courts under 709, Rev.Stat., and what constitutes an *ex post facto* law, are stated in the opinion.

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MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a criminal prosecution in the State of Oregon, instituted by an information charging the defendants, of whom the plaintiff in error was one, with having converted to their own use a large sum of money belonging to the state's irreducible school fund, agricultural college fund, and university fund, collectively spoken of as educational funds, then held for safekeeping in a bank of which the defendants were in control as its officers and directors. Upon a separate trial of the plaintiff in error, he was convicted and sentenced to a term of imprisonment and to pay a fine. An appeal to the supreme court of the state resulted in the elimination of the fine and in the

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affirmance of the judgment in other respects. 55 Or. 450 -- L.R.A.(N.S.) --, 104 P. 596, 106 P. 1022. The plaintiff in error then brought the case here, claiming that rights secured to him by the Constitution of the United States, and specially set up in the supreme court of the state, were denied by the judgment of affirmance.

Briefly outlined, the case, as we must take it to be, is as follows: in June, 1907, the bank became an "active depository" under a statute of the state presently to be mentioned, and thereupon an account was opened with the bank as such depository in the name of the state treasurer, with the added designation, "educational." The deposits going into the account consisted of checks and drafts belonging to the state's educational funds, and the money collected by the bank on these checks and drafts, less what was drawn out by the state, amounted on November 6, 1907, to $288,426.87. On that day, the bank failed, and it was then disclosed that, on August 21, the total cash in the bank was $296.19 short of the

amount called for by the account, and that this shortage had continued and increased until the day of the failure, when it reached $274,882.73. The defendants had not literally appropriated any of the money to their personal use, but, knowing that it belonged to the state's educational funds, and was received and held by the bank as an active depository, had permitted it to be commingled with other deposits and funds, and had sanctioned its use in paying liabilities of the bank.

The prosecution was founded upon 1807 of Bellinger & Cotton's Anno.Codes & Statutes of Oregon, which declares:

"If any person shall receive any money whatever for this state, . . . or shall have in his possession any money whatever belonging to such state, . . . and shall in any way convert to his own use any portion thereof, . . . such person shall be deemed guilty of larceny. "

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By an act taking effect May 26, 1907, Laws of 1907, c. 135, p. 248, the legislature of the state provided for the designation of "state depositories for the purpose of receiving on deposit funds of this state, and paying out the same on order or checks of the state treasurer" (1, 2); made it the duty of the treasurer to "deposit and at all times keep on deposit" in such depositories the "money in his hands belonging to the several funds in the state treasury," excepting a reserve of not to exceed $100,000 with which to pay current obligations (3); required each depository to pay interest on deposits of such funds at not less than two percent per annum (3, 4), and to give approved security "for the payment of such deposits and the interest thereon" (5), and made the following declaration relating to educational funds (16):

"The word 'funds,' used in this act, shall apply to all funds in the state treasury except the common school, * agricultural college, and university funds."

The same act authorized the designation of

"an active depository for the collection of any drafts, checks, certificates of deposit, and coupons that may be received by him [the treasurer] on account of any claim due the state"

(6); required such depository to give approved security

"for the prompt collection of all drafts, checks, certificates of deposit, or coupons that may be delivered to such active depository by the state treasurer for collection; also, for the safekeeping and prompt payment on the state treasurers' order of the proceeds of all such collections"

(7), and in that connection provided (8):

"The state treasurer, on receipt of any draft, check, or certificate of deposit, on account of state dues, may place the same in such active depository for collection, and it shall be the

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duty of such active depository to collect the same without delay, without charge for its services for such collection, or for exchange, and to notify the state treasurer when collected. The compensation to be paid by such active, depository shall be fixed by the state treasurer upon the best terms obtainable for the state."

The words "funds" particularly defined in 16, as before quoted, was not used in any of the sections having special relation to the active depository.

Before the passage of the depository act, the supreme court of the state had occasion to consider and determine, in *Baker v. Williams Banking Co.,* 42 Or. 213, 222-225, whether, in view of 1807 of Bellinger & Cotton's Codes (then 1772, Hill's Ann.Laws), the state treasurer lawfully could make a general deposit in a bank of money of the state belonging to its educational funds, and it was held that he could, the court saying:

"It is made a felony by statute for any person having in his possession any money belonging to the state, county, town, or other municipality to convert to his own use

or loan the same, with or without interest (Hill's Ann.Laws, 1772), and while a mere deposit in a bank for safekeeping is not inhibited by this provision, it is manifest that, in case of the failure of the bank, the officer is not entitled to interest in his own right on the fund so deposited, whatever the right of the state or municipality might be in the premises. If, therefore, the claims are in fact for public money, as the objectors allege, no interest should be allowed thereon. A public officer may not loan, with or without interest, any part of the public funds in his possession without being guilty of a felony, but he is required to keep such funds safely, and for that purpose may deposit them in a bank, provided they are at all times subject to his order, and there is no fixed period during which he has no right to demand their return. . . . The deposit is made on his own personal responsibility,

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however, and if, in case of the failure of the bank, he makes the loss good, the money deposited must necessarily become his property, and thereafter be considered and treated as such."

After that decision, and before the transactions here in question, the depository act was passed and put in force, but its construction and operation were not determined by the supreme court of the state until it passed upon the case at bar. It was then held (a) that the act made provision for general depositories, wherein moneys of the state not belonging to the educational funds were to be placed as general deposits, with the right in the depository to commingle them with other deposits and to loan them in the usual course of business, and with an absolute obligation on the depository to pay interest on them at not less than two percent per annum; (b) that the act also made provision for an active depository for the collection of checks, drafts, and the like, belonging to any state fund, whether educational or otherwise, and the safekeeping of the proceeds, subject to the treasurer's order, but with no right in the depository to commingle them with other deposits or to loan them, and with no specific or absolute obligation on the depository to pay interest thereon; (c) that, by contrasting the provisions relating to general depositories with those relating to the active depository, it was evident that deposits in the latter, unlike deposits in the former, were to be special, the title not

passing to the depository, but remaining in the state, and (d) that the act operated, and the legislature intended, to take the educational funds out of the custom or right of the treasurer to make general deposits which was recognized in *Baker v. Williams Bkg. Co. supra.* Then, coming to apply the act, as so construed, together with 1807, to the facts of the case as reflected by the verdict of the jury, it was further held (1) that the bank held the money as a special deposit, the title being in the state; (2) that the

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defendants, being in control of the bank as its officers and directors and knowing of the deposit, were to be regarded as having the money in their possession within the meaning of 1807; (3) that the commingling of the money with other deposits and the using of it in paying liabilities of the bank constituted an unlawful appropriation of it; (4) that as the defendants, as controlling officers and directors of the bank, sanctioned that appropriation, knowing that the money belonged to the educational funds of the state and was held by the bank as an active depository, they thereby converted the money to their own use within the meaning of 1807, even although the appropriation was for the benefit of the bank, and not of themselves personally.

It will be perceived that, but for the depository act, as so construed, the deposit would have been a general one, merely creating the relation of debtor and creditor between the bank and the state, and the commingling and use of the money in the manner shown would not have been a crime under 1807.

The record shows that the plaintiff in error contended in the supreme court of the state that the depository act was not reasonably susceptible of the construction ultimately adopted, and that to put such a construction upon it would be violative of the prohibition in the Constitution of the United States against *ex post facto* state laws. Both phases of the contention were denied, the second necessarily failing with the first, and the plaintiff in error now assigns error upon that holding, and complains that it deprived him of a right secured by the Constitution.

Bearing in mind what has been said, and especially that the depository act and 1807 were both in force at the time of the alleged offense, it will be perceived that the real complaint which we are asked to consider is not that the supreme court of the state in any wise

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rested its judgment upon a statute passed after the time of the alleged offense, but only that it misconstrued a preexisting statute to the disadvantage of the plaintiff in error, and that such a decision is an *ex post facto* law within the meaning of Article I, 10, of the Constitution, which declares: "No state . . . shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

But that provision of the Constitution, according to the natural import of its terms, is a restraint upon legislative power, and concerns the making of laws, not their construction by the courts. It has been so regarded from the beginning. In *Calder v. Bull,* 3 Dall. 386, one of the first cases in which the provision was considered, it was spoken of as reaching legislative, but not judicial, acts, and in *Fletcher v. Peck,* 6 Cranch 87, 10 U. S. 138 , Chief Justice Marshall said of it: "In this form, the power of the legislature over the lives and fortunes of individuals is expressly restrained." True, neither of those cases turned upon the question whether the words "no state shall pass a law" embrace a decision of a court construing a statute, but that question was both presented and decided in *Commercial Bank v. Buckingham,* 5 How. 317. There, the Supreme Court of Ohio, in an action upon a contract, had put upon two preexisting statutes of the state a construction which was claimed to be unreasonable and to impair the obligation of the contract, and it was sought to have that decision reviewed by this Court on the ground that it denied a right secured by the Constitution of the United States. But the writ of error was dismissed for want of jurisdiction, because, as was said in the opinion (p. 46 U. S. 342):

"If this Court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be not whether the statutes of Ohio are repugnant to the Constitution of the United States, but whether the Supreme Court

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Ohio has erred in its construction of them. It is the peculiar province and privilege of the state courts to construe their own statutes, and it is no part of the functions of this Court to review their decisions or assume jurisdiction over them on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary."

A like question was presented, and similarly disposed of, in *New Orleans Water Works Co. v. Louisiana Sugar Refining Co.,* 125 U. S. 18 , 125 U. S. 30 , where it was said:

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals."

And in *Brown v. Smart,* 145 U. S. 454 , 145 U. S. 458 , where a decision of the Court of Appeals of Maryland, expounding a statute of that state, was challenged as impairing the obligation of a contract made after the statute came into existence, it was held that the decision "was not a law" within the meaning of the provision against the impairment of contractual obligations by state laws. Many other cases give effect to this ruling, but it will suffice to cite, from among them, *Central Land Co. v. Laidley,* 159 U. S. 103 , 159 U. S. 109 ; *Bacon v. Texas,* 163 U. S. 207 , 163 U. S. 220 ; *Hanford v. Davies,* 163 U. S. 273 , 163 U. S. 278 ; *Turner v. Wilkes County,* 173 U. S. 461 ; *Cross Lake Shooting & Fishing Club v. Louisiana,* 224 U. S. 632 , 224 U. S. 638 .

But whilst thus uniformly holding that the provision is directed against legislative, but not judicial, acts, this Court with like uniformity has regarded it as reaching

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every form in which the legislative power of a state is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a bylaw or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the state exercising delegated legislative authority. *New Orleans Water Works Co. v. Louisiana Sugar Refining Co., supra; St. Paul Gas Light Co. v. St. Paul,* 181 U. S. 142 , 181 U. S. 148 ; *Davis & Farnum Manufacturing Co. v. Los Angeles,* 189 U. S. 207 , 189 U. S. 216 ; *Grand Trunk Railway Co. v. Railroad Commission,* 221 U. S. 400 , 221 U. S. 403 . Of course, the ruling here in question was by an instrumentality of the state; but as its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time, it is quite plain that the ruling was a judicial act, and not an exercise of legislative authority. As was said in *Prentis v. Atlantic Coast Line Co.,* 211 U. S. 210 , 211 U. S. 226 :

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."

The plaintiff in error cites the cases of *Kring v. Missouri,* 107 U. S. 221 ; *Muhlker v. New York & Harlem Railroad Co.,* 197 U. S. 544 ; *Louisiana v. Pilsbury,* 105 U. S. 278 ; *Gelpcke v. Dubuque,* 1 Wall. 175, and *Butz v. Muscatine,* 8 Wall. 575, as holding that a judicial decision may be a law in the sense of the constitutional provision which he invokes. But none of those cases, when rightly considered, sustains that position. The first was a criminal case in which a provision in a new constitution was held to be an *ex post facto* law as to an offense theretofore committed; the second presented the question whether a state statute of 1892 impaired contractual obligations

created by deeds of a much earlier date; the third and fourth were explained in *Central Land Co. v. Laidley,* 159 U. S. 103 , 159 U. S. 111 -112; *Bacon v. Texas,* 163 U. S. 207 , 163 U. S. 221 -223, and *Turner v. Wilkes County,* 173 U. S. 461 , and were there shown not to be in conflict with other cases on the subject, and the fifth is in no wise distinguishable from the fourth.

We conclude that no federal right was involved in the ruling respecting the construction of the depository act.

The prosecution was instituted by an information conformably to a law of the state in force at the time. Bellinger & Cotton's Codes, 1258. Following the judgment of conviction, and while the case was pending on appeal, a constitutional amendment was adopted, declaring:

"No person shall be charged in any circuit court with the commission of any crime or misdemeanor defined or made punishable by any of the laws of this state, except upon indictment found by a grand jury."

The plaintiff in error thereupon advanced the contention that the constitutional amendment worked a repeal of the statute under which the information was filed, and made it impossible to enforce the judgment against him without depriving him of his liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. The state court ruled that the amendment to the state constitution was prospective, and did not affect pending cases. Error is now assigned upon that ruling. But it involved nothing more than the construction of the constitutional amendment, which was a question of local law, and its decision by the state court is not reviewable here.

As the record presents no federal question, we are without jurisdiction to review the judgment, and therefore cannot enter into the merits of the questions that were presented and determined in the state court.

Writ of error dismissed.

* The common school fund and the irreducible school fund appear to have been identical. Or.Laws 1907, c. 117, 36.