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Validity of State Supervision of Secret Societies

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monthly deficiencies of rental the tenant must plainly remain liable for rent during his term surviving eviction or, where his term under the covenant of the lease ceases upon such eviction, clear expression must show that his damages were to be computed monthly on the rental loss sustained through reletting, for to hold him to liability in the latter case is to place upon him a burden possibly heavier than he sustains for a deficiency at the end of the term. "He must pay in the lean months without recouping in the fat ones. He must do this though it may turn out in the end that there has been a gain and not a loss." But where the damages are computed at the end of the term his liability is determined by allowing him all sums collected so that there might be a deficiency. "A liability so heavy may not rest upon uncertain inference."

Rather evidently by the drafting of this last clause the Hermitage Company failed in its purpose. To quote Judge Cardozo again;[24]

> "We do not overlook the hardship to the landlord in postponing the cause of action until October, 1945. The hardship is so great as to give force to the argument that postponement to a date so distant may not reasonably be held to have been intended by the parties. There is no reason to suppose, however, that the landlord was expectant of so early a default or so heavy a deficiency. It had in its possession a deposit of cash security in the sum of $30,000. Very likely this was supposed to be enough to make default improbable and the risk of loss remote. If the damage clause as drawn gives inadequate protection, the fault is with the draftsman. The courts are not at liberty to supply its omissions at the expense of a tenant whose liability for the future ended with the cancellation of the lease except in so far as he bound himself by covenant to liability thereafter."

G. M. B.

VALIDITY OF STATE SUPERVISION OF SECRET SOCIETIES.—A member of a secret society who was held in custody to answer a charge of violating a New York statute brought a proceeding in habeas corpus to obtain his discharge on the ground that the warrant under which he was arrested and detained was issued without jurisdiction in that the statute, with violation of which he was charged, was unconstitutional.[1] The offense alleged was that he attended

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[24] *Supra* Note 3, 248 N. Y. at 338.

[1] People *ex rel.* Bryant v. Zimmerman.

meetings and remained a member of the Buffalo Provisional Klan of the Knights of the Ku Klux Klan,[2] he then having knowledge that such association had wholly failed to comply with the requirements of the Walker Law.[3]

The petition for habeas corpus, while asserting that the state statute was unconstitutional, contained no mention of any constitutional provision, state or federal, which petitioner claimed was

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[2] (An unincorporated association, neither a labor union nor benevolent order, as mentioned in the Benevolent Orders Law, having a membership of more than 20 persons and requiring an oath as a prerequisite or condition of membership.) Consol. Laws of N. Y., Chap. 3.

[3] Civil Rights Laws, Secs. 53-56 inclusive:

"Section 53. Copies of documents and statements to be filed. Every existing membership corporation, and every existing unincorporated association having a membership of twenty or more persons, which corporation or association requires an oath as a prerequisite or condition of membership, other than a labor union or a benevolent order mentioned in the benevolent orders law, within thirty days after this article takes effect, and every such corporation or association hereafter organized, within ten days after the adoption thereof, shall file with the secretary of state a sworn copy of its constitution, by-laws, rules, regulations and oath of membership together with a roster of its membership and a list of its officers for the current year. Every such corporation and association shall, in case its constitution, by-laws, rules, regulations or oath of membership or any part thereof, be revised, changed or amended, within ten days after such revision or amendment file with the secretary of state a sworn copy of such revised, changed or amended constitution, by-law, rule, regulation or oath of membership. Every such corporation or association shall within thirty days after a change has been made in its officers file with the secretary of state a sworn statement showing such change. Every such corporation or association shall at intervals of six months file with the secretary of state a sworn statement showing the names and addresses of such additional members as have been received in such corporation or association during such interval.

"Section 54. Resolutions Concerning Political Matters. Every such corporation or association shall, within ten days after the adoption thereof, file in the office of the secretary of state every resolution, or the minutes of any action of such corporation or association, providing for concerted action of its members or of a part thereof to promote or defeat legislation, federal, state or municipal, or to support or to defeat any candidate for political office.

"Section 55. Anonymous Communications Prohibited. It shall be unlawful for any such corporation or association to send, deliver, mail or transmit to any person in this state who is not a member of such corporation or association any anonymous letter, document, leaflet or other written or printed matter, and all such letters, documents, leaflets or other written or printed matter, intended for a person not a member of such corporation or association, shall bear on the same the name of such corporation or association, and the names of the officers thereof together with the addresses of the latter.

"Section 56. Offenses; Penalties. Any corporation or association violating any provision of this article shall be guilty of a misdemeanor punishable by a fine of not less than one thousand dollars nor more than ten thousand dollars. Any officer of such corporation or association and every member of the board of directors, trustees or other similar body, who violates any provision of this article or permits or acquiesces in the violation of any provision of this article by any such corporation shall be guilty of a misdemeanor. Any person who becomes a member of any such corporation or association, or remains a member thereof, or attends a meeting thereof, with knowledge that such corporation or association has failed to comply with any provision of this article, shall be guilty of a misdemeanor."

violated. The trial court sustained the validity of the statute and refused to discharge the petitioner,[4] and on appeal that judgment was affirmed by the Appellate Division [5] and by the Court of Appeals.[6] The opinion delivered by the court of first instance was similarly indefinite in its reference to a constitutional provision. The first mention of violation of a specific constitutional provision is found in the opinion of the Appellate Division which distinctly stated that the relator's claim of invalidity was based on an asserted deprivation of rights secured to him by the "due process" clause of both state and federal constitutions.[7] Nor does the Court of Appeals, in its opinion, elaborate upon the charge of unconstitutionality. No mention is made of the 14th Amendment though the decision does state that the relator asserted the unconstitutionality of the statute on the ground that it deprived him of his liberty without "due process" of law and denied him the "equal protection" of the laws. There is nothing to indicate an abandonment, by the relator, of his reliance on the 14th Amendment as distinctly stated in the opinion of the Appellate Division. On the contrary, the Court of Appeals' discussion of the case and its citation of authorities proceeded as if it were considering the identical claim of invalidity mentioned in the opinion of the Appellate Division and there denied. As a matter of fact, the opinion of the Court of Appeals shows that in denying the relator's petition it practically rested its decision on the authority of Radice v. N. Y.,[8] where another statute of New York had been assailed as in conflict with the equal protection clause of the 14th Amendment.

Following this unsuccessful effort to obtain his freedom, the relator sued out a writ of error under the Judicial Code,[9] which provides in part that the United States Supreme Court may review upon writ of error "a final judgment or decree in any suit in the court of last resort of a state where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of its validity." Although the action was one brought primarily to test the validity of a state statute, several important points covering the jurisdiction of the Supreme Court were clearly set forth by Mr. Justice Van Devanter in an interesting and instructive opinion. In substance, he stated that although a petitioner makes no specific mention of constitutional provisions, and the highest court of the state rules against the petitioner without expressly referring to any constitutional provision, yet no particular form of words or phrases is necessary to draw in question the validity of a state statute.

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[4] 123 Misc. 859, 206 N. Y. Supp. 533 (1924).
[5] 213 App. Div. 414, 210 N. Y. Supp. 269 (1925).
[6] 241 N. Y. 405, 43 A. L. R. 909, 150 N. E. 497 (1926).
[7] N. Y. Const. Art 1, Sec. 6; U. S. Const. 14th Amendment.
[8] 264 U. S. 292, 296, 297, 68 L. ed. 690, 695, 44 Sup. Ct. Rep. 325 (1923).
[9] Sec. 237A.

The jurisdiction of the Supreme Court to review the decision was also questioned because of the nature of the case, it being a proceeding in habeas corpus to obtain the discharge of one held in custody to answer a charge of violating a state statute, the validity of that statute never having been determined. Mr. Justice Van Devanter dismissed this contention by citing the early case of Holmes v. Jennison,[10] where the Supreme Court held, after careful consideration, that a proceeding in habeas corpus in a state court to obtain the release of one held in custody on a criminal charge where the detention is alleged to be in violation of the constitution of the United States is a suit within the meaning of the Judicial Code [11] and that an order of the state court of last resort refusing to discharge him is a final judgment subject to review by the United States Supreme Court. This phase of the opinion is supported by an unbroken line of later decisions, all of which, in their material facts, were similar to the instant case.[12]

The court, after disposing of this jurisdictional point, then proceeded to a consideration of the validity of the statute in question. In a careful review of relator's contention that under the "due process" clause the statute deprived him of liberty by preventing him from exercising his right of membership in the association, the court pointed out that if any privilege arose out of citizenship it was an incident of state rather than United States citizenship and such protection as is thrown about it by the state constitution is in no wise affected by its possessor being a citizen of the United States.[13] There can be no doubt but that petitioner's liberty in this regard, like most other personal rights, must yield to lawful exercise of the police power, and that the requirements of the Walker Law are a reasonable regulation established for the two-fold purpose of informing the state, within whose territory and under whose protection the association exists, of the nature and purpose of that association; of whom it is composed; and by whom its acts are conducted; and also of requiring this information to be supplied for the public files and

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[10] 14 Pet. (U. S.) 540, 563, 568, 597, 10 L. ed. 579, 590, 593, 607 (1840).

[11] *Supra* Note 9.

[12] Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564 (1888); Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214 (1896); New York *ex rel.* Lieberman v. Van De Carr, 199 U. S. 552, 50 L. ed. 305, 26 Sup. Ct. Rep. 144 (1905); New York *ex rel.* Silz v. Hesterberg, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10 (1908); North Dakota *ex rel.* Flaherty v. Hanson, 215 U. S. 515, 54 L. ed. 307, 30 Sup. Ct. Rep. 179 (1909); Collins v. Texas, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286 (1911); Sligh v. Kirkwood, 237 U. S. 52, 59 L. ed. 835, 35 Sup. Ct. Rep. 501 (1914).

[13] *Slaughter House* cases, 16 Wall. 36, 77, *et seq.* 21 L. ed. 394, 409 (1872); Bradwell v. Illinois, 16 Wall. 130, 139, 21 L. ed. 442, 445 (1872); Bartemeyer v. Iowa, 18 Wall. 129, 133, 21 L. ed. 929, 930 (1873); Minor v. Happersett, 21 Wall. 162, 171, 22 L. ed. 627, 629 (1874); United States v. Cruikshank, 92 U. S. 542, 551, 552, 23 L. ed. 588, 590, 591 (1875); Giozza v. Tiernan, 148 U. S. 657, 661, 37 L. ed. 599, 601, 13 Sup. Ct. Rep. 721 (1892); *Re* Lockwood, 154 U. S. 116, 117, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082 (1893).

thereby effecting a substantial deterrent to violations of public and private rights. It is a natural consequence that power to require this disclosure also includes the authority to prevent individual members of an association, which has failed to comply with the statute, from remaining members or participating in the activities of the organization if they have knowledge of its default.

The petitioner further contended that the statute discriminates against the Knights of the Ku Klux Klan and other associations in that several associations having oath-bound membership such as the labor unions, Masonic fraternity, the Independent Order of Odd Fellows, and Knights of Columbus, are excepted from the requirements. It is to be noted that these organizations, claimed to be excepted, are all specifically mentioned in the Benevolent Orders Law of New York State, which provides for their incorporation and requires the names of their officers as elected from time to time to be reported to the Secretary of State. Furthermore, the equal protection clause does not detract from the right of the state to justly exert its police power or prevent it from adjusting its legislation to differences in circumstances or forbid classification in that connection, but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. Mere evidence of apparent inequality, however, is not enough to invalidate a statute. The state is free to recognize degrees of potential good and evil and may confine its legislation to those classes of cases where the need is deemed to be clearest. The courts below in reviewing this right recognized clearly the demand for equal protection and were justified in finding the difference between the Knights of the Ku Klux Klan and the associations specifically excepted from the statute. In pointing out this difference the courts said of the Knights of the Ku Klux Klan:

> "It is a matter of common knowledge that this organization functions largely at night, its members disguised by hoods and gowns, and doing things calculated to strike terror into the minds of the people."

and in distinguishing the excepted class:

> "These organizations and their purposes are well known, many of them having been in existence for many years. Many of them are oath-bound and secret, but we hear no complaints against them regarding violation of the peace or interfering with the rights of others. The benevolent orders mentioned in the Benevolent Orders Law have already received legislative scrutiny and have been granted special privileges so that the legislature may well consider them beneficial rather than harmful agencies."

It is plain that the action of the courts in holding that there was a real and substantial basis for the distinction made between the two sets of associations or orders was a correct conclusion. In the one case we find an apparent tendency to make the secrecy surrounding its purposes and membership a cloak for acts and conduct inimical to personal rights and public welfare, while in the other class there is a total absence of such tendency.

As to the last contention of petitioner, that the classification is an arbitrary one in that it is confined to associations having a membership of twenty or more persons, the Supreme Court ruled that such legislation is not unreasonable. A state may well decide for itself that an association of less than twenty persons would have only a negligible influence and any measure to restrain it would not be necessary.

The opinion of Mr. Justice Van Devanter indicates clearly that the Supreme Court will give a petitioner every consideration on his plea of unconstitutionality, yet they will refuse to interfere with the inherent police power of the sovereign state to regulate its internal affairs.

W. E. C.

DISTRIBUTION OF CORPORATE DIVIDENDS BETWEEN LIFE TENANT AND REMAINDERMAN.—The courts are frequently called upon to decide whether a particular distribution of a corporation to its stockholders is income for the benefit of a life tenant or capital to be added to the corpus of the trust estate for the benefit of the remainderman.

Over fifty years ago the New York Court of Appeals said that "It will be the duty of the Court, when the occasion arises, to seek to settle the question upon principle and establish a rule for the guidance of trustees and others" [1] but the court is still without a definite rule, determination in each case resting upon its own facts and circumstances.[2]

Decisions on the subject have opened the door to much confusion as an examination of a few cases under the various rules will show.

Early English Rule.

The early English rule, now partially obsolete, established as far back as 1799, states that all ordinary cash dividends shall be paid to

[1] Riggs v. Cragg, 89 N. Y. 487 (1882).

[2] *In re* Osborne, 209 N. Y. 450, at 475, 103 N. E. 723, at 730 (1913).