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Notes and Comments

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NOTES AND COMMENTS

Licensing the Distribution of Religious Pamphlets

The name of the English poet John Milton and his "Appeal For The Liberty Of Unlicensed Printing" were invoked in the courtroom of the United States Supreme Court on June 8, 1942 when that court, by a five to four decision,[1] turned back the pages of history more than one hundred and fifty years to uphold a tax strongly reminiscent of the Stamp Taxes of England and the Massachusetts Colony. Surely the spirits of departed Justices must have been startled to hear the court declare that the Constitution of the United States does not prohibit a substantial revenue-raising tax on the non-commercial distribution of religious and educational books and pamphlets. One present must have wondered what the great Chief Justice John Marshall would have said to Justice Reed's assertion that a substantial tax is neither abridgment nor prohibition, as he remembered the famous pronouncement that "The power to tax is the power to destroy."[2]

By its decision, the court, Mr. Justice Reed speaking for the majority of five, upheld the convictions of four members of the religious sect known as Jehovah's Witnesses for violating city ordinances in three separate states, requiring licenses, issuable on the payment of substantial fees, for carrying on the business of peddling. The ordinance of Opelika, Alabama, imposed an annual license fee of either $10 or $5, depending on whether the applicant wished to follow the business of book agent or transient distributor of books, together with an additional fifty cents issuance fee. It made all licenses subject to revocation in the discretion of the City Commission with or without notice to the licensee. Jones was convicted under it for displaying religious pamphlets in his upraised hand while walking on the street and for selling them at the price of two for five cents, without having first obtained a license. That of Fort Smith, Arkansas, stated that a license must be obtained before following the "vocation or business" of peddling dry goods and other articles. The fee was $25 a month, $10 a week, or $2.50 a day.[3] Bowden and Sanders were convicted under it for going from house to house without a license playing records of Bible lectures and peddling books setting forth their religious beliefs in return for the contribution of a single quarter. To those who could not contribute, the books were given free. The Casa Grande, Arizona, ordinance specified that no person should carry on the trades or businesses therein specified, including peddling, without a

1 Jones v. City of Opelika, Alabama, Bowden and Sanders v. City of Fort Smith, Arkansas, Jobin v. Arizona, —U. S.—, 62 S. Ct. 1231, 86 L. Ed. 1174 (1942) affirming decisions in 241 Ala. 279, 3 So. (2d) 76 (1941); 202 Ark. 614, 151 S.W. (2d) 1000 (1941); —Ariz.—, 118 P. (2d) 97 (1941).

2 McCulloch v. Maryland, 4 Wheat. (U.S.) 316, 4 L. Ed. 579 (1819).

3 In contradistinction to the individual peddler, who was required to pay $300 a year, a person using two or more men in his peddling business had to pay only $50 a year.

license. Peddlers were defined as any persons selling any goods or merchandise on the street or from door to door. The fee required was $25 for a three-month period. Jobin was convicted under it for going to two homes and a laundry, playing his record on religion. In two instances he sold a book entitled "Religion" for twenty-five cents a copy while in the third he gave the book and some pamphlets away, all without a license. The Arizona Court had upheld the ordinance as applied to him as an ordinary occupational license tax measure.

In none of the ordinances specified were any limitations set as to the time, place, or manner of "peddling" so they were not regulatory and raised no question of how far the police power, exercised in the name of public safety, could encroach upon civil liberties. All three cases presented the issue of whether or not a license tax substantial in amount abridges the guaranteed freedom of speech and religion. The Opelika ordinance, with its provision for discretionary revocation, raised the further issue of whether the exercise of the right of free speech can be made subject to the censorship of an administrative official. In addition, the practical operation of the Opelika ordinance again raised the issue presented earlier to the United States Supreme Court in the case of *Yick Wo* v. *Hopkins*,[4] of whether an ordinance, non-discriminatory on its face, is valid when it has been applied to only one group of persons covered by it.

In his opinion, Mr. Justice Reed said that, since the petitioners had made no claim that the size of the fees was so large as to be a substantial deterrent to the distribution of their literature, the amount of such charges was not in issue. The sole constitutional question before the court, he stated, was whether a non-discriminatory license fee, presumably appropriate in amount, might be imposed on the activities referred to above. The opinion argued that though none of the rights protected by our Constitution are absolute, still it would deny any place to the censorship of ideas,[5] and while absolute prohibition of the dissemination of information would be invalid,[6] it was held that such regulation of conduct as was found herein would be proper. To subject a religious group to the obligation of paying a fee for their money-making activity does not require a finding that the licensed acts are purely commercial, but when the proponents of ideas use commercial methods to raise propaganda funds, the state may exact a fee for canvassing. In the mere collection of such fees there is no prohibition or abridgment of freedom of

[4] 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

[5] Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938); Schneider v. Irvington, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939), with which are grouped in the same decision (and same citation) Young v. California, Snyder v. Milwaukee, and Nichols v. Massachusetts, popularly known as the Handbill cases; Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

[6] Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939); Schneider v. Irvington, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

speech or religion. If abridgment is shown, the fee is invalid.[7] Prohibition and unjustifiable abridgment are to be condemned but the same is not true of taxation. The syllogism was completed by finding that the activities here involved were not religious nor educational, but commercial.

The arbitrary revocation feature of the Opelika ordinance, the majority held, was not in issue because there had been no revocation. In this respect the case was distinguished from *Lovell* v. *City of Griffin*,[8] which had held that an ordinance providing for discretionary power in granting the license was bad upon its face. The hazard of revocation, the court thought, was too slight to merit a declaration of invalidity. That the same ordinance might be invalid because of discrimination in its application, the majority discussed not at all.

Chief Justice Stone wrote a dissent,[9] pointing out that each of these ordinances represented, to him, a prohibited invasion of the freedoms of religion, of speech and of the press guaranteed by the Constitution.[10] On the issue of the power to revoke the license under the Opelika ordinance, he declared it to be void upon its face because it made the enjoyment of these freedoms dependent upon the discretion of an administrative official. This he deemed to be a more callous disregard of constitutional rights than that exhibited by the ordinance involved in the Lovell case. In either situation the enjoyment of the freedom was contingent upon the same discretion. The censorship would be as effective in the one case as in the other. The question of the right to raise the issue, he said, was here indistinguishable from that in the Lovell case where it was decided in the only way consistent with the First Amendment. He further maintained that by challenging these ordinances, the petitioners had also challenged the substantial taxes they imposed thus directly raising in issue the deterrent effect of the charges upon the rights of free speech and religion. In his opinion, the issue had become whether or not a flat tax, more than a nominal fee to defray the expenses of a regulatory license, could be constitutionally imposed on a non-commercial, non-profit activity devoted exclusively to the dissemination of ideas, educational and religious in character. The Constitution was said to forbid *all* laws abridging free speech, not some laws, nor all except tax laws.

A second dissent, by Justices Black, Douglas and Murphy, pointed out that the decision of the case had sanctioned a device which could suppress the free exercise of religion. It thereby became another step in the

7 Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936).

8 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

9 Mr. Justices Black, Murphy and Douglas concurred.

10 U. S. Const., First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . . ."

direction taken by the "flag salute" case.[11] Thus one wrong step was being followed by another.

Still a third dissenting opinion[12] stated that the ordinances, as applied, placed a burden on the circulation of opinion regarding matters of religion, hence were invalid. The fact that the ordinance was not enforced against more orthodox ministers in Opelika clearly showed discrimination in its application. In addition, all three imposed direct taxes on religion and consequently violated the Fourteenth Amendment.[13] The question of the discretionary power to revoke the license was regarded as an issue before the court inasmuch as, where regulation or infringement of liberty of discussion and dissemination of opinion became involved, there are special reasons for testing the challenged statute on its face.[14] Likewise the amount of the license fees was directly involved since the sums charged constituted a serious burden or prohibition on the circulation of the pamphlets. Liberty of circulation is the very life blood of a free press. Taxes on the circulation of ideas have a long history of misuse against the freedom of thought.[15] In this opinion considerable space was also devoted to denouncing these taxes as an infringement upon the right to worship God according to the dictates of conscience and the right to carry the Gospel to every living creature. To think that any minister could be taxed before he entered the pulpit was incredible. Why then should not this conception of freedom be extended to people who consider the public streets as their pulpits?

The result of the decision and of the views expressed in the majority opinion is that a way has now been found, after diligent effort and many defeats, to curtail effectively or even to prohibit the expression of unpopular views by minority groups. The case seems to mean that a state may now prohibit those who cannot afford to distribute their pamphlets free from distributing them at all. The simple device of a heavy tax in the guise of a license fee stops the dissemination of ideas at the start. The exact point involved apparently has never before been presented to the United States Supreme Court. Apparently, lawyers had assumed that a revenue tax on the non-commercial distribution of pamphlets would be unconstitutional. The history of the Stamp Taxes with their intended

[11] Minersville School District v. Gobitis, 310 U. S. 586, 60 S. Ct. 1010, 84 L. Ed. 1375 (1940).

[12] Written by Mr. Justice Murphy, in which Chief Justice Stone, and Justices Black and Douglas joined.

[13] Mr. Justice Murphy cited City of Blue Island v. Kozul, 379 Ill. 511, 41 N.E. (2d) 515 (1942), in which a substantially similar ordinance was declared invalid on this and related grounds.

[14] See Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938); Thornhill v. Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941).

[15] See Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936); English Stamp Tax Act of 1712, 10 Anne, c. 19; Collett, History of Taxes on Knowledge (1899); Place, Taxes on Knowledge (1891).

effect of curtailing the circulation of newspapers hostile to the party in power; the colonial experience with such measures; and the fact that these taxes were what, in part, the Bill of Rights was aimed at, makes this a reasonable assumption.[16] In the light of history, it can hardly be presumed that the framers of our Constitution did not intend to forbid such taxes. The case most nearly in point is the Grosjean case,[17] which held invalid a tax on the gross receipts of a newspaper. Mr. Justice Sutherland there said: "It is equally impossible to believe that it was not intended to bring within the reach of these words the modes of restraint (on the press which were accomplished by newspaper taxes)."[18] It seems, therefore, that the present decision is against precedent in holding that taxes on the circulation of opinion are not within the interdiction of the Bill of Rights.

A second and related issue is whether or not a tax on the dissemination of ideas by pamphlets, for which a small charge is made, is an abridgment of the freedom of the press. The majority say, without discussion, that it is not. This again seems doubtful because the obvious effect of a tax of three hundred dollars a year is prohibitory on the distribution of pamphlets or other forms of literature for which but a small charge is made. Since pamphlets have been historic weapons in the cause of freedom, and since for most of them a charge has necessarily been made, a tax on their distribution is most certainly an abridgment of their circulation.

The court has, in earlier cases, held invalid ordinances requiring a permit before distributing literature of any kind,[19] or prohibiting the distribution of pamphlets in public places,[20] or requiring a permit before distributing literature from house to house,[21] and even requiring approval from an official before soliciting for any charitable or religious purpose.[22] It now appears to uphold a taxing device which would probably be more effective than any of these measures in preventing or limiting the dissemination of pamphlets carrying minority opinions.

The issue of restraint by censorship, as presented by the Opelika ordinance, was squarely before the court since the provision for revocation without notice appeared on the face of the ordinance. Upon this

16 The dissenting opinion by Mr. Justice Murphy states: "Research reveals no attempt to control or persecute by the more subtle means of taxing the function of preaching, or even any attempt to tap it as a source of revenue. (The Stamp Act of 1765 exempted wholly religious books)."—U. S.—, 62 S. Ct. 1231 at 1251, 86 L. Ed. 1174 at 1195. Zechariah Chafee, Jr., Free Speech in the United States (Harvard University Press, Cambridge, Mass., 1941) 381, states: "Altho the undesirability of such 'taxes on knowledge' had been frequently discussed by historians, the judicial problem of their validity was almost unprecedented."

17 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936).

18 297 U. S. 233 at 248, 56 S. Ct. 444 at 449, 80 L. Ed. 660 at 668 (1936).

19 Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

20 Schneider v. Irvington, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

21 Ibid.

22 Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

point the court should have followed the Lovell, Schneider and Cantwell cases and declared the ordinance void. The Supreme Court of Illinois has held invalid, as applied to the distribution of literature, an ordinance containing a similar provision for censorship by a public official.[23]

Will the present decision have any effect on the problem in Illinois? That question should be easily answered in the negative, because the Illinois Constitution is even more explicit than that of the United States in guaranteeing the freedom of religion and of the press.[24] Our Supreme Court has held invalid an ordinance requiring peddlers to pay a license fee of $25 a year, as applied to persons walking on a public sidewalk and attempting to sell religious literature without profit to themselves but as part of their religious worship.[25] Such a tax was regarded as a restraint on circulation of information in contravention of both the Illinois and United States Constitutions. It held that a license fee, as well as censorship, is an abridgment of freedom of the press. In so deciding the Illinois Court relied heavily on the Lovell, Schneider, Grosjean, Cantwell and Hague cases. If the decision in the instant cases is regarded as having severely limited those decisions it may be that other state courts, in the interpretation of state constitutions, may show a corresponding modification of views. But the force and the clarity of the argument in Mr. Chief Justice Stone's dissenting opinion are strongly persuasive of the correctness of his position. G. ADLER

CIVIL PRACTICE ACT CASES

MORTGAGES — FORECLOSURE — LITIGATION OF ADVERSE TITLES IN FORECLOSURE PROCEEDINGS UNDER THE ILLINOIS CIVIL PRACTICE ACT — In the recent case of *Korngabiel* v. *Fish*[1] the Appellate Court of Illinois, for the Second District, considered an appeal from the denial of an intervening petition filed by a tax title holder, claiming to have acquired the fee title, who sought to intervene in certain foreclosure proceedings based on a trust deed. The original complaint named the appellant as a party defendant, alleging that he claimed some interest in the property by virtue of certain tax deeds, the exact nature of the interest being unknown to the plaintiff. Appellant filed a motion to strike the paragraph of the complaint wherein his interest was set forth, as being indefinite and not properly stating facts relative to his tax title. On the date set for the hearing of this motion, the plaintiff, upon his own motion, dismissed the complaint as to appellant. Thereafter, appellant presented his petition

23 Village of South Holland v. Stein, 373 Ill. 472, 26 N.E. (2d) 868 (1940).

24 Ill. Const. 1870, Art. II, § 3: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed . . . nor shall any preference be given by law to any religious denomination or mode of worship." Art. II, § 4: "Every person may freely speak, write and publish on all subjects. . . ."

25 City of Blue Island v. Kozul, 379 Ill. 511, 41 N.E. (2d) 515 (1942).

1 313 Ill. App. 286, 40 N.E. (2d) 314 (1942).

alleging that he was the owner of the fee title to the property described in the complaint; that his title was separate and adverse to that of the mortgagors and their grantees; that he and his grantors had been in possession of the property continuously since 1932; and that his tenant was now in possession. He alleged that the receiver appointed in the foreclosure case was wrongfully collecting rents from his tenant, and he sought to intervene and have his rights adjudicated. The trial court granted leave to appellant to file his petition and then summarily denied the prayer thereof.

In affirming this ruling the Appellate Court assigned as its reason that the only proper parties to a bill to foreclose a mortgage or trust deed are the mortgagor and the mortgagee and those who acquired rights under them subsequent to the mortgage; that appellant should not have been made a party to the suit in the first instance, and, after being dismissed out of the case, had no right to come back in by way of petition for leave to intervene. The principles relied on by the court do not seem to be in accord with other recent decisions on similar problems since the adoption of the Illinois Civil Practice Act.

It is true that the procedural steps followed in the instant case seem to be technically correct. The plaintiff undoubtedly had the right, under Section 52 of the Civil Practice Act,[2] at any time before trial or hearing, to dismiss his action as to appellant.[3] Furthermore, when appellant sought to reenter the case, it was well within the discretion of the court to grant or deny the petition for leave to intervene.[4] Whether its action was wise under the circumstances is doubtful.[5] Certainly, the reasons assigned for affirming the decision are not in accord with the liberal construction that has been given to Sections 23, 24, and 25 of the Civil Practice Act[6] by other Illinois courts. The court was undoubtedly familiar with *Prudential Insurance Company of America* v. *Hoge*[7] and related decisions which state the rule that where a party does not claim title through or under the mortgagee or mortgagor he is not a proper party to a foreclosure proceeding and should be dismissed from the action,[8] but the Illinois Civil Practice Act and the

2 Ill. Rev. Stat. 1941, Ch. 110, § 176.

3 Galeener v. Hessel, 292 Ill. App. 523, 11 N.E. (2d) 997 (1938); Kilpatrick v. Edidin, 313 Ill. App. 439, 40 N.E. (2d) 610 (1942).

4 Lake View Trust & Savings Bank v. Rice, 279 Ill. App. 538 (1935); Kilpatrick v. Edidin, 313 Ill. App. 439, 40 N.E. (2d) 610 (1942).

5 It would now appear as though plaintiff may proceed with his foreclosure, but, when the purchaser has acquired a deed and seeks to gain possession of the premises, he will be faced with the necessity of litigating his right thereto with appellant, who will in no way be bound by the foreclosure decree.

6 Ill. Rev. Stat. 1941, Ch. 110, §§ 147, 148, and 149.

7 359 Ill. 36, 193 N.E. 660 (1934).

8 Gage v. Perry, 93 Ill. 176 (1879); Whittemore v. Shiell, 14 Ill. App. 414 (1883); Whitaker v. Irons, 300 Ill. 254, 133 N.E. 265 (1921); National Bank v. 168 Adams Building Corp., 359 Ill. 27, 193 N.E. 511 (1934); Prudential Insurance Co. of America v. Hoge, 359 Ill. 36, 193 N.E. 660 (1934); Lithuanian Alliance v. Home Bank & Trust Co., 362 Ill. 439, 200 N.E. 167 (1936); Jones v. Horrom, 363 Ill. 193, 1 N.E. (2d) 694 (1936).

more recent decisions thereunder have established a different rule today.[9]

Thus in *Trapp* v. *Gordon*,[10] the Supreme Court of Illinois held, under the new procedure, that issues involving and parties claiming a freehold interest in mortgaged premises were properly joined in a foreclosure suit. In *Bobzien* v. *Schwartz*,[11] the Appellate Court for the First District not only held that the holder of a tax title was a proper party to a mortgage foreclosure, but, in construing Section 25 of the Civil Practice Act,[12] declared:

"When it came to the notice of the court that other parties were claiming a lien on the said premises and an interest therein, it was the duty of the court to stop the foreclosure suit and direct that such claimants be made parties. The court should not have refused such parties the opportunity to be heard or to intervene and be made parties thereto and set up their interests."[13]

In *Kronan Building and Loan Association* v. *Medeck*,[14] the Illinois Supreme Court pointed out that though the rule before the Civil Practice Act had been that questions of freehold were not germane to a foreclosure proceeding, still Sections 38, 43, and 44 of the Act[15] had revised this view, and said:

"There is no rule of this court which prevents a joining of the various issues involved in this proceeding in a single action. The language of these sections quoted is clear, and in the absence of a rule preventing joinder of issues of title with that arising on a bill to foreclose, it is equally clear that such issues may be joined under those sections of the Civil Practice Act."[16]

These earlier expressions were again approved in *Citizens National Bank of Alton* v. *Glassbrenner*.[17]

Whatever the old rule may have been, the newer expression thereof, indicated by these decisions, is more in harmony with the spirit of the Illinois Civil Practice Act. The court in the instant case, however, has indicated a willingness to take a step backward. Securing a "complete determination of the controversy" as contemplated by Section 25 of the Act[18] is not a matter to be controlled alone by the plaintiff. The duty rests also on the court. C. C. McCULLOUGH

9 Trapp v. Gordon, 366 Ill. 102, 7 N.E. (2d) 869 (1937); Bobzien v. Schwartz, 289 Ill. App. 299, 7 N.E. (2d) 362 (1937); Kronan Building & Loan Ass'n v. Medeck, 368 Ill. 118, 13 N.E. (2d) 66 (1938); Citizens Nat. Bank of Alton v. Glassbrenner, 377 Ill. 270, 36 N.E. (2d) 364 (1941).

10 366 Ill. 102, 7 N.E. (2d) 869 (1937).

11 289 Ill. App. 299, 7 N.E. (2d) 362 (1937), noted in 15 CHICAGO-KENT LAW REVIEW 303.

12 Ill. Rev. Stat. 1941, Ch. 110, § 149.

13 289 Ill. App. 299 at 304, 7 N.E. (2d) 362 at 364.

14 368 Ill. 118, 13 N.E. (2d) 66 (1937), noted in 16 CHICAGO-KENT LAW REVIEW 279.

15 Ill. Rev. Stat. 1941, Ch. 110, §§ 162, 167, and 168.

16 368 Ill. 118 at 121, 13 N.E. (2d) 66 at 68.

17 377 Ill. 270, 36 N.E. (2d) 364 (1941).

18 Ill. Rev. Stat. 1941, Ch. 110, § 149.