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NOTES

A DISCUSSION OF THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934.—It has been stated that economic decline brings discrimination. Perhaps in no other field has this been proven to be truer than in the field of securities. The Stock Exchange and the general subject of securities has been frequently investigated. In 1909 the Hughes Committee on Speculation first checked into the matter. Another committee, operating in 1912-1913 also gave a full report. Because of the shrinkage of market values following the crash of 1929, there has been a revision of ideas concerning the advisability of permitting short sales to go unrestrained. Public pressure was brought to bear upon the Federal government to investigate the matter. In 1932 a Congressional Committee was set up to investigate the matter and to pass needed legislation. The investigation properly went beyond consideration of short selling into a survey of manipulation in the marketing of securities. The investigation of the 1932 Congressional Committee eventually resulted in the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934 and the creation of the Securities and Exchange Commission under that later act.

Under the Securities Act of 1933, a prospectus of securities must not be sent through the mails or through other instruments of interstate commerce unless a registration certificate has been filed with the Securities and Exchange Commission. The certificate, copies of which are obtainable by the public, is kept on file in a public reference room. It must be signed by its issuer, by principal executive, financial, and accounting officers, and by a majority of the board of directors, and must contain or be accompanied by the following data:

Capitalization, voting rights, amount of securities outstanding and detailed description thereof;

Amount of funded debt outstanding and to be created by the security which the issuer proposes to offer;

Price at which the security is to be offered; all commissions and expenses paid or to be paid in connection with such sale; any amount paid to a promoter within two years before filing the statement, and the consideration furnished for such payment;

A balance sheet of not more than 90 days before filing of the certificate, and a profit and loss statement for 3 years preceding the filing of such certificate;

Counsel's opinion as to legality of the issue;

Copies of underlying agreements or trust indentures affecting securities to be offered.

If the certificate contains false or misleading statements, civil remedies are available to purchasers against any person who signed it, provided action is started within two years after the discovery of the false statement or the omission, but in no event can suit be started more than 3 years after the security was offered to the public. The statute also provides criminal sanctions, and makes the provisions of the federal criminal code in regard to using the mails to defraud applicable to the sale of securities in interstate commerce.

The Securities Exchange Act of 1934 was designed to curb unfair practices in the securities market, by which a pool may manipulate or "rig" the market. Usually the market is "rigged" by the use of "wash sales" or "matched orders." The act creates the Securities and Exchange Commission with supervisory powers over the stock exchanges. It requires the filing of a registration statement and annual reports from which the investing public may obtain information as to the management and financial condition of corporations whose securities are traded in the market. It restricts solicitation of proxies and regulates trading by officers and directors, and principal stockholders in the corporation's securities, and requires them to report such transactions. Here a principal stockholder is defined as one owning more than 10% of any class of equity security.

Similar regulatory powers are conferred on the commission with respect to over-the counter trading.

The Act seeks to prevent speculative booms by limiting the volume of credit available to brokers. According to the 1934 Act the broker's aggregate loans must not exceed 2,000% of his own capital. Of course, this is not much regulation so far as the broker's loans are concerned; however, when one considers that prior to 1933, brokers began to do business literally on a "shoe-string," usually with disastrous results to

themselves and particularly to the public, this control does at least keep the most irresponsible from dealing with the public as brokers.

One check of the Securities Exchange Commission on brokers is in the regulation of the hypothecation of securities found in U. S. C. A. Sec. 78, as follows:

"It shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts a business in securities, through the medium of any such member directly or indirectly. . . . in contravention of such rules and regulations as the commission shall prescribe for the protection of investors, to hypothecate or arrange for the hypothecation of any securities carried for the amount of any customers under circumstances (1) that will permit the commingling of his securities without his written consent with the securities of any person or other customer, (2) that will permit such securities to be commingled with the securities of any person other than a bona fide customer or, (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee for a sum in excess of the aggregate indebtedness of such customers in respect of such securities."

The Act fixes minimum margin requirements, and gives to the Federal Reserve Board control over margin accounts. The original Act of 1934 provided that the customer put up at least 10% on margin accounts. It has since been amended so that the customer must put up at least 50%. At the present time there is legislation before Congress, in which it is suggested that at least during the period of the duration of the war and war time emergency the margin feature of stock transactions be completely eliminated. This would eliminate margin trading and would change the nature of the Stock Exchanges from speculative exchanges to merely investment houses, as banks, etc. Such legislation seems to be in line with current legislation aimed at preventing speculative booms and resulting catastrophic depressions.

Robert A. Oberfell.

AN EXAMINATION OF CONGRESSIONAL VESTING OF FEDERAL COURTS WITH AUTHORITY TO DEAL WITH STATE MATTERS.—Our government is unique. It consists of forty-eight states and a federal government. Hence our governmental functions are divided between the states and the federal government with a "No Man's Land" reserved for the people. In addition there are some powers which may be exercised concurrently by federal and state government. With this meager background let us attempt to answer the question confronting us.

Why may laws passed by Congress be declared unconstitutional? An alien would have some difficulty understanding our judicial review, yet it safeguards our liberties. Chief Justice Marshall established the right

of judicial review in the now historic decision of *Marbury v. Madison* [1] where he said: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an Act of the legislature, repugnant to the Constitution, is void." Marshall went on to say that it is up to the courts as well as the other departments to uphold the Constitution and declare laws opposed to the Constitution void.

Let us assume a problem involving such a situation. *A*, an alien, and *B*, a citizen, enter into a written contract whereby *A* agrees to purchase *B's* farm and makes a down payment of fifteen hundred dollars. Subsequently Congress passes an act giving Federal courts exclusive jurisdiction over cases arising between citizens of the United States and aliens. The alien then tenders the balance of payment to *B* and *B* refuses to carry out the contract. *A* sues in a state court for specific performance and *B* moves to dismiss the suit for want of jurisdiction, citing the Federal act. Assuming the act is clearly unconstitutional, and *A* offers to prove as much, may the State court hear the matter, and if so, has it the power to declare the Federal act unconstitutional?

Immediately we may eliminate the United States Supreme Court from this discussion because the act could not grant said court exclusive jurisdiction due to the fact that the original jurisdiction of the Supreme Court is limited by Article Three, Section two, paragraph two of the Federal Constitution to cases affecting ambassadors, other public ministers and consuls and those in which the State shall be a party. So in the case before us the issues must be decided in a Federal Court or in a State court.

It is well settled, too, that the courts will not declare a statute or law unconstitutional without first proceeding with great caution, but will uphold the legislative act if it is reasonably possible to do so.[2] In *Ashwander v. Tennessee Valley Authority* the prerequisites for a decision of a constitutional question are presented.[3] We need not outline them here; it is sufficient for our purposes to note that the courts will not pass on the constitutionality of a law merely for the sake of doing so.

Federal courts do not have exclusive jurisdiction of controversies arising under the Constitution, and upon the state courts equally with the courts of the union rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States when-

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1 1 Cranch 137, 2 L. Ed. 60 (1803).

2 Green v. Biddle, 8 Wheat. 81; 5 L. Ed. 547 (1821-23). Also see: Kryder v. State, 214 Ind. 419, 15 N. E. (2d) 386 (1938).

3 297 U. S. 288, 56 S. Ct. 466, 80 L. Ed. 688 (1936). Also see: State ex rel Johnson v. Clayton, 211 Ind. 327, 7 N. E. (2d) (1937).

ever these rights are invaded on any suit or proceeding before them.[4] State courts, for example, have been held to have jurisdiction of controversies arising between citizens and aliens,[5] and state courts when authorized by state law are said to have concurrent jurisdiction with federal courts to enforce rights secured by the constitution and laws of the United States.[6] The Constitution of the State of Missouri, for instance, provides that the State court has power to decide cases arising under the Federal Constitution,[7] and Missouri cases have been decided in accordance therewith.[8] A Federal court recently held and wisely so, that in the sensitive area of concurrent jurisdiction of state and national judiciaries, Federal courts must ever be mindful of the dignity of the state and should refrain from injudicious use of their discretionary authority.[9] The State courts then are as open as Federal courts to entertain actions between aliens and citizens,[10] as well as actions involving most federal questions,[11] and if the State court proceeds and renders judgment it then is reviewable in the United States Supreme Court upon certiorari.[12]

State courts have heard cases arising under the Emergency Price Control Act and upheld its constitutionality. Nevertheless they have intimated that the State courts not only have power to hear such cases, but also to declare the Act unconstitutional if it appears to be so beyond a reasonable doubt. "While the power of inferior tribunals such as this court (State court) to pass upon the validity of statutes in the course of judicial administration is unquestioned, nevertheless the exercise of such power should be carefully limited. Unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional, it is considered better practice for inferior courts to assume that said Act is constitutional until the contrary is declared by a court of appellate jurisdiction." [13]

A good statement on the inadvisability of trial courts passing on such matters appears in *In Re Oetman:*[14] "Trial courts should carefully limit the exercise of their power to declare acts unconstitutional." And

4 Mooney v. Holohran, 294 U. S. 103 (1935); Robb v. Connolly, 111 U. S. 624 (1884).

5 King of Prussia v. Kuepper, 22 Mo. 550, 66 A. Dec. 639 (1856).

6 21 C. J. S. 798, Courts § 526.

7 Missouri Constitution, Article 6, Sec. 22.

8 Macabees v. City of N. Chicago, 125 F. (2d) 330 (1942).

9 McKittrick v. American Colony Ins. Co., ... Mo. ....., 80 S. W. (2d) 876.

10 Mondou v. New York, New Haven & Hartford RR, 223 U. S. 1 (1912).

11 Lehigh Valley RR Co. v. Marlin, 100 Fed. (2d) 139 (1938); Ex Parte Martin, 180 Fed. 209 (1910); Moreno v. Picardy Mills, 17 N. Y. S. (2d) 848 (1939); Book Tower Garage v. Local No. 415, 295 Mich. 580, 295 N. W. 330 (1940).

12 Stone v. South Carolina, 117 U. S. 430 (1886).

13 Diefenbaugh v. Cook, ... Ind. ..... (1942).

14 9 Fed. Supp. 575 (1934).

in a Pennsylvania case[15] Judge Dickinson weighed in with this fine admonishment: "The position taken is that the question of the constitutionality of an act of Congress is best left to the appellate courts, and a trial court should not annul an act unless it is in conflict with some plain mandate of the Constitution. This is not a rule of law but of judicial policy."

An act of Congress such as presented here is an invasion of the power of the State courts, and deprives said court of jurisdiction over matters which originally it had power to adjudicate. It is a matter of law that every court has judicial power to hear and determine the question of its own jurisdiction.[16] The court furthermore is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment.[17] Thus when it inquires into the correctness of the averment it will determine the constitutionality of the act since State courts have power to decide cases arising under the Federal constitution. If the State court then believes the act is unconstitutional it shall be the duty of the judge of said court in the administration of justice and under Article Six, Section two of the Constitution, and by his oath to uphold the Constitution of the United States to declare the act unconstitutional.

Nevertheless, the question cannot be set aside so quickly. It is generally agreed that state courts may determine whether state statutes are valid.[18] However, as to the consideration of Federal laws a limitation arises. Speaking of the Social Security Act, it has been declared that state courts may determine the validity of a Federal statute when this issue is properly raised and necessary to the determination of the validity of a state statute dependent thereon, though its decision is not final.[19] In *Jefferson v. Gypsy Oil Co.*[20] the Federal Court of the Eighth Circuit averred that the decisions of the highest state courts as to constitutionality are very persuasive, but are not controlling on Federal courts in construing Federal statutes.

While discussing the Federal Employers Liability Act the Arkansas court said: "No mention is made in this statute of the jurisdiction of courts to enforce the rights declared or created by it, and it is well settled that state courts may exercise concurrent jurisdiction with the Federal courts in all cases arising under the Constitution, laws, and treaties of the United States, unless exclusive jurisdiction has been con-

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15 Mather v. McLaughlin, 151 F. 608 (1907).

16 Davidson v. Rafferty, 34 Fed. (2d) 700 (1929).

17 Wylie Co. v. Lynch, 195 Fed. 386 (1912).

18 Baker v. Grice, 169 U. S. 284, 42 L. Ed. 748, 18 S. Ct. 323 (1898).

19 Howes Bros. Co. v. Mass. Unemployment Compensation Commission, 296 Mass. 275, 5 N. E. (2d) 720 (1936).

20 27 F. (2d) 304 (1928).

ferred expressly or by necessary implication on the Federal courts." [21] Again in *Claflin v. Houseman* [22] the Supreme Court said: "The laws of the United States are as much the law of the land in any state as state laws are, and although in their enforcement exclusive jurisdiction may be given to the Federal courts, yet where such exclusive jurisdiction is not given or necessarily implied, the state courts having competent jurisdiction in other respects may be resorted to."

A further limitation appears in *Young Spring & Wire Corp. v. Falls* [23] where the Michigan Supreme Court said the federal statute giving Federal courts jurisdiction of all cases arising under the patent or copyright laws of the United States does not deny a state court jurisdiction where the case is fundamentally one over which the state court has jurisdiction but where incidental thereto, a question arises on the Federal act.

In conclusion, we may say that state courts must uphold the Constitution. They may exercise concurrent jurisdiction with federal courts over many matters, although as long as Congress stays within the limits of the Constitution it may give exclusive jurisdiction to Federal courts. In regard to state statutes the ruling of the state court is usually final. As to federal law it is persuasive only, here the Supreme court has the last word. If the federal law involved here is prima facie an invasion of state rights, the court may hold it unconstitutional. If otherwise, Congress could legislate the jurisdiction to the Federal courts.

On the one hand it seems that if Congress may by legislation deprive state courts of jurisdiction over local matters, it would be possible for Congress in this way to legislate state courts out of existence by giving federal courts exclusive jurisdiction of everything. Undoubtedly this was never contemplated by the framers of the Constitution. On the other hand, the exigencies of the emergency of war call for action that in normal times would be challenged on constitutional grounds. The Constitution of the United States had for its fundamental purpose the protection of the rights of man, — the unalienable rights of the people — and whatever action by the Congress or by the Courts during the stress of war is deemed necessary to guarantee the continuation of these rights indefinitely may be regarded as constitutional now, without particular regard to such legislation covering similar matters in a normal time. That these are not normal times is certainly not to be contradicted. However, to answer the question of the constitutionality of a federal

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21 St. Louis I. M. & S. Ry. Co. v. Hesterly, 135 S. W. 874, 98 Ark. 240 (1911).

22 93 U. S. 130, 23 L. Ed. 833 (1876).

23 293 Mich. 602, 292 N. W. 498 (1940). Also see: La Chapelle v. United Shoe Machinery Corp., 172 N. E. 568, 272 Mass. 465 (1930).

statute conferring exclusive jurisdiction on Federal courts to hear matters which by their very nature would be matters for state court jurisdiction, it seems that such legislation would be unconstitutional. To allow Congress to enact, enforce, and carry out such an act would be to allow them to strip the state courts of their jurisdiction at the slightest whim, wish or desire, of the United States Congress. There must continue to be a check and balance between State and Federal governments and as such the States should not be deprived of their constitutional rights. It is the right and duty of the state courts, in preservation of their states' rights, not only to hear the case before it, but to declare such an act unconstitutional.

John Power.
John D. O'Neill.
Arthur M. Diamond.

DOES PAROL EVIDENCE RULE PREVENT PROOF OF CUSTOM AND USE?—The question to be determined is whether the parol evidence rule prevents proof of custom and use, to alter the terms of a written contract. As early as 1834 this proved to be a very important problem for the courts throughout the land. Judge Story, in the case, *The Schooner Reeside,*[1] was one of the first jurists to discuss this matter. He stated as follows:

"I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs, in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well settled principles of law. And I rejoice to find, that, of late years, the Courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when

[1] 2 Sumn 567.

the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it never can be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori* not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the party."

Thus it is to be seen that Judge Story believes that courts should not admit parol testimony in regard to customs or uses to overrule a written instrument. The case, *Fuller v. Robinson* [2] also supports this opinion. In this case, the plaintiff employed one Robinson as broker, to make sales of cigars in the city of New York and other eastern markets. Plaintiffs were residents of Illinois where the cigars were manufactured. Robinson advised the plaintiffs of the sale of twelve cases of cigars to a Mr. Richardson who in turn never paid. The plaintiff sued his broker Robinson for the amount. The courts allowed the defendant to show by parol testimony that by the custom and usage of that business, no reliance is placed by the manufacturers and sellers of cigars and tobacco upon the representation of brokers employed to make sales in respect to the credit of the persons from whom time orders are procured, but that the principal ascertains for himself, whether the persons ordering through the broker are entitled to credit, paying no regard to the broker's representation upon the subject. On an appeal to the higher courts, the evidence was held to be incompetent. The court went on to say that evidence of a usage, or custom of trade is frequently admitted to annex unexpressed incidents to contracts, or to explain ambiguous and doubtful phrases in written agreements. But reasonableness is one of the requisites of a valid usage, and an unreasonable or absurd custom cannot be set up to affect the legal rights of parties. However evidence of the customs of a particular trade is admitted, to supply what is not expressed, or to explain what is doubtful, upon the presumption that persons engaged therein are acquainted with and understand and tacitly assent that their contracts shall be interpreted in the light of the recognized usages. They held the evidence should not have been admitted.

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2 86 N. Y. 306, 40 Amer. Rep. 540 (1881).

The case of *Rickerson v. Hartford Fire Insurance Company* [3] further substantiates Judge Story's early decision. In this case on a policy for fire insurance, it appeared that the application described the property as "160 Mott street, occupied for stores and dwellings," while the policy described it as "brick building and addition," and it also appeared that in fact there were two brick buildings on the lot. The defendant sought to introduce evidence that a custom prevailed in the insurance business as to the manner of describing certain kinds of property, and that it was the intention of the manager of the company when he issued the policy to describe the buildings in a certain manner. The courts refused to allow such testimony to be admitted into evidence and stated in part that there was nothing to show that such a custom was the general custom prevailing or even that there ever existed such a custom in the insurance business.

The North Shore Improvement Company v. New York P. & N. R. Company et al [4] adds further light to the subject. The facts in this case were briefly as follows: A bill of lading provided for delivery of a car at a particular crossing in Norfolk; the defendants attempted to show through parol testimony that it was the general custom on the part of the carrier to tender delivery of cars consigned to Norfolk in Port Norfolk. The courts refused again to admit such testimony as the bill of lading called for delivery at a particular siding and therefore custom cannot modify the written contract of the parties. The court concluded by adding that even if the plaintiff had known of the custom, it would not override the written terms of the instrument. In *Green v. Wachs et al* [5] the court held that parole evidence of custom that jewelry brokers were expected to sell jewelry consigned to them is inadmissible in that by the admission of such testimony, the terms of a written contract would be varied and changed. The case *Hopper v. Sage* [6] the court held that the agreement in question being unambiguous and having been made at the defendant's office by a broker for plaintiff who was not acting as a member of the New York Stock Exchange, the rules of the stock exchange were inadmissible to vary the legal rights and liabilities of the parties.

It is therefore to be seen that it is impossible to introduce into evidence, customs to vary the terms of a written agreement. The court in *Gilbert et al v. McGinnis et al* [7] went even further than this. They decided that where corn is sold for future under parol agreement, and the purchaser promises as a part of the agreement to make advances to the seller of such money as he may from time to time require, evidence

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[3] 149 N. Y. 307, 43 N. E. 856 (1896).

[4] 130 Virg. Rep. 464, 108 S. E. 11 (1931).

[5] 254 N. Y. 437, 173 N. E. 575 (1930).

[6] 112 N. Y. 530, 20 N. E. 350 (1889).

[7] 114 Ill. 28, 28 N. E. 382 (1885).

that it was the general custom of grain merchants to take the seller's notes for such advances, or that it was the previous dealing of the parties, is inadmissible, since the effect would be to add an inconsistent stipulation to what was clearly expressed and understood between them. It can be therefore seen that an oral agreement in some cases cannot be contradicted by oral testimony of custom and use.

The question can now be answered by a great weight of the authorities: — it is impossible to introduce custom and usage evidence to vary the terms of a written agreement.

Theodore M. Ryan.

FREEDOM OF THE PRESS.—Perhaps one of the first to recognize the power and political importance of a free press in England was Henry VIII, (1509-1547) who not only limited the privilege of publication to a few favored individuals, but, by royal decree, proclaimed that all printing was subject to prior inspection by a licenser. Later, the so-called "Long-Parliament" of England (1640-1660) did not hesitate to adopt this precedent of the tyranny it had overthrown. But in 1771, a printer disobeyed a House of Commons proclamation forbidding publication of debates, and then ignored a summons to appear before it on a charge of violation.

For this action of contempt, he was arrested, but was promptly discharged on trial by the magistrates of London. The Lord Mayor of London was then sent to the Tower by Parliament for upholding the printer, but his imprisonment was of short duration, because the crowds of London demonstrated against Parliament, with this body finally yielding to strong public sentiment against any press restrictions.

The first great English journals are said to date from this emancipation period, and it followed naturally that the framers of our Constitution would give expression to the right of a free press, hating, as they did oppression in any form. When we consider this hatred of oppression, and the constant agitation for complete liberty, it may be wondered why the right of a free press was not contained in the first seven Articles of the Constitution. On this question, most historians agree that the omission was a matter of expediency on two counts. First, to avoid the addition of a debatable issue by the states, while they were engaged in ratifying the Constitution, and secondly, that such freedom was impliedly or actually guaranteed in their respective Bills of Rights.

However, freedom of the press subsequently became a fundamental provision of Article I to amend the Constitution, which denied Congress the right to legislate against it, and this provision was further implemented by Article XIV, Section 1, which provided that no State

shall make or enforce any law abridging the privileges or immunities of its citizens, nor deprive them of life, liberty or property, without due process of law, nor deny equal protection under the law.

Notwithstanding these seeming guarantees of unqualified press freedom, there are certain restrictions on the press, without which, to paraphrase R. W. Jones, an author on Journalism, liberty would degenerate into license.[1]

An appropriate expression of the difference between liberty and license of press is also given by Blackstone,[2] wherein the right to a free press by an editor is substantiated, "but, if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

From a strictly definitive point, R. W. Jones, *supra,* states: "Freedom of the press is the right to publish, without official preview or censorship, and without official obstruction, anything the editor and proprietor of a newspaper, periodical or magazine may decide to publish, subject, however, to the penalties imposed by law for publication of libel, contempt of court, sedition, obscenity, blasphemy or other nonmailable matter."

The first historically significant case of record in the United States, where a publisher was arrested for his sentiments, occurred in 1734, when one Zenger, publisher of the New York Journal, was confined on a charge of seditious libels against the Crown of England, as a result of criticism against New York's Governor Cosby and his council. Alexander Hamilton defended Zenger, basing his case on the premise that if the alleged libel were true, he should be acquitted. Despite the fact that this premise was contrary to common law in England, where it was held "the greater the truth, the greater the libel," a jury found for Zenger, and established a precedent for future cases of press freedom in America.

Relative to the wide divergence between the United States and other nations on press restrictions, James Truslow Adams, eminent historian, stated that the American press is incomparably more independent than those of 13 countries visited, and that the bulwarks to retain this freedom are in the Bill of Rights and the Supreme Court. To tamper with these bulwarks, he continued, would result in destruction of a free press, and the people would suffer repression.

One method of tampering with the press, as noted in English history, is the establishment of a licensing law. Evidently America recognized the inherent evils in that system, because it has never been necessary to obtain a license of any kind in order to publish a newspaper, magazine or similar publication in this country. If obtaining

1 Law of Journalism, Jones.

2 Blackstone, Vol. IV, p. 151.

a license to publish were necessary, it would automatically set up a condition of possible censorship, and have the basic element for a "controlled," instead of "free" press. In his "Commentaries" [3] on this subject, Blackstone states: "To subject the press to the restrictive power of a licenser, * * * is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." Hallam,[4] an English historian, says the same thing a little more succinctly: "Liberty of the press consists, in a strict sense, merely in an exemption from the superintendence of a licenser."

In totalitarian States, (Russia, Germany and Japan) the right of free press is virtually extinct, with all published matter subject to rigid regulation and inspection by government officials. On the slightest pretext, these officials will summarily suspend publications considered inimical to the state and frequently imprison or execute publishers for articles construed to be contra-governmental.

From time to time, the United States Federal and State Legislatures have also passed laws which purport to control, or at least regulate, freedom of the press. The important difference in the United States is that if the laws tend to be arbitrary or appear contrary to the "due process" guarantees of the Constitution, the Federal judiciary declares the restrictions void. Further, the Federal government does not concern itself with all published matter, but only with obscene writings, the publication of lotteries, demand for statement of ownership of publications to avail use of second class mail privileges, seditious writings, and more recently, fraudulent advertising.

The most spectacular restrictions of a free press, from the point of general interest, are enactments of Congress against sedition, the trials of which usually occur during wartime, when public sentiment is easily aroused on allegations of such activity.

The first passage of anti-sedition statutes (Alien and Sedition Laws) occurred in 1798, and were political, rather than nationally protective, in intention. This fact is particularly brought out by their prohibition of defamatory remarks anent the character, etc., of the President and Congress, during a time when the Federalist and Republican parties were violently partisan, and the Federalists were in power. These laws were attacked by several states, among them Virginia, whose John Adams declared, in substance, that it was better to have a free press with few noxious branches, than to kill the entire tree by cutting off some of them.

In World War I, June 1917, the Espionage Acts were passed by Congress, with an addition of a Seditious Libel Amendment in 1918.

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[3] Blackstone, "Commentaries," p.. 152.

[4] Constitutional History of England, Hallam.

The acts had a provision which limited them to the duration of the war, and there were about 2000 prosecutions and some 1000 convictions made under the acts and amendment.

Among these was a case of *United States v. Pierce*,[5] which was fairly typical of all those tried.

Pierce, a Socialist, had issued circulars or pamphlets denouncing conscription, European interests of J. P. Morgan, with particularly lurid details of the horrors of war and the senseless killing, followed by cynical references to patriotism, failure of food control measures in the United States, exploitation tactics of England, etc.

Pierce was convicted under Section 3 of the Espionage Act: "Whoever, when the United States is at war, shall willfully make or convey false statements with intent to interfere * * * or shall willfully obstruct the enlistment of recruiting service in the United States * * * shall be punished by a fine of not more than $10,000.00 or imprisonment for more than twenty years, or both."

In another case, the Seditious Libel Amendment to the Espionage Act of May, 1918, was used against one Abrams, and four others, who appealed on conviction from an inferior court to the Supreme Court.[6]

Abrams was charged with four violations of the amendment, namely (1) disloyal, scurrilous language about the form of government; (2) language intended to give contempt, scorn, contumely and disrepute to the government; (3) language intended to incite, provoke and encourage resistance to the United States, and (4) unlawfully and willfully, by utterance in printing and publication, to incite and urge curtailment of armament production.

Three of the defendants admitted they were revolutionists and anarchists, and the fourth stated his cause as Socialism. All of them pleaded not guilty, basing their plea on the free press reference in Article I of the Constitution. Further, they asserted that their printed mater did not intend to discourage our war against Germany, but against Russia, whose monarchy would use our bullets to repel the worker's revolution.

Alter full deliberation of the evidence, the Supreme Court affirmed a lower Federal court's conviction on counts three and four previously noted.

Justice Holmes dissented to the conviction, mainly on extent of the penalty — 20 years imprisonment, for what he alleged was immaturity of thinking on part of the defendants, and that on this basis, the Court's action was severe to the point of persecution. Justice Brandeis concurred with Holmes in dissent.

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[5] Dist. Ct. of U. S., 1917; 245 Fed. 878 (1917).

[6] Abrams v. United States, 250 U. S. 616; 40 Sup. Ct. 17; 63 L. Ed. 1173 (1919).

The position taken by Holmes and Brandeis here had an illustrious and even more charitable forebear, in the person of Thomas Jefferson, who, while President, discharged every individual punished or prosecuted under the Sedition Act of 1798, *supra,* because "I considered and now consider that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image * * *."

Returning to the subject of freedom of the press relative to taxation, when any tax against the press represents a discriminatory burden, the matter becomes vital to the very essence of liberty itself. A case in point, proving the bulwarks provided by the Constitution and the Supreme Court, involved the *American Press Co. v. Grossjean.*[7]

Grossjean, acting as Supervisor of Public Accounts in Louisiana, attempted to enforce a statute of the Louisiana Legislature which had imposed a 2% gross tax on advertising revenue from newspapers with a circulation of 20,000 or more. The plaintiffs, American Press Co., including nine publishers, took their opposition to the tax to the courts of Louisiana, pleading violation of due process of law statements in the Fifth and Fourteenth Amendments.

The plaintiffs lost their case in the courts of Louisiana, but won on appeal to the Federal District Court, at which the defendant, Grossjean, appealed to Supreme Court.

On this trial Justice Sutherland, speaking for the majority, held that the tax would curtail revenue from advertising and restrict circulation, thus placing a double restraint on publications, which was a *prima facie* violation of first and fourteenth Amendments. Quoting Cooley's book on Constitutional Limitations, he also adopted the premise that "The evils to be prevented were not the censorship of the press, merely, but any action of government which might prevent * * * discussion * * * for intelligent exercise of the rights of the people."

Justice Sutherland further noted that Louisiana was the only state in 150 years to pass such a law, and that, while owners of newspapers are not immune from taxation to support the government, they are protected against any tax of a single kind, which, in the light of history and present setting, seemed a calculated device to limit circulation.

Mr. Sutherland's remarks on "light of history" referred to the use of taxation by the British Crown and Parliament to suppress opposition to their government, a method of suppression not abandoned until 1854. Also, the remark included the stamp and advertising taxes of Massachusetts in 1785, used for the same purpose, which were repealed due to extreme opposition in 1785 and 1786.

The "present setting" reference was quite likely an allusion to the Huey Long government of Louisiana, which, during the period of the

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7 56 Sup. Ct. Rep. 444 (1935).

trial, was using power politics in its most odious forms to intimidate many Louisiana commercial enterprises.

The facts and decision here leave no doubt that proposed or actual taxes on publications of all types should be carefully scrutinized to find whether they act as restriction of news matter or advertising, and particularly, of circulation. In any instance where the effect of tax legislation against publication is doubtful, benefit of the doubt should be accorded the publications.

Aside from the obviously wrong political restrictions of a free press attempted in Louisiana, there are times when the press does use its privileges to no apparent good purpose, and becomes an agency of persecution. An outstanding example of such persecution was the Lindbergh Kidnapping Case, in which the Lindberghs were hounded to a point where they became embittered against the press generally, and to escape, finally left the country for an extended period.

There is really no justification for publications to act in such manner, especially since the actions are based on desire and accepted practice of newspapers to "scoop" rivals and "play up" well-known persons, regardless of injury to the peace of mind of those publicized. Yet, a curb on these abuses would have a tendency to enlarge, until press freedom would probably suffer in many instances where no restrictions should be imposed. Therefore, most sufferers from over-publicity have no redress under the law, unless the expressions are of a palpably libelous character. Even then, it is usually much easier to charge libel than to prove it.

One state, Minnesota, attempted to correct the effects of pitiless publicity by a statute designed to protect those who were attacked, and who had little or no recourse to the usual libel law remedies. Passed in 1925, this statute was commonly known as the Minnesota Gag Law, and its validity eventually came to trial in the United States Supreme Court in 1931 on constitutional issues.

The law had been upheld in the Minnesota state courts, and was finally appealed to Federal jurisdiction by one Near, publisher involved.[8]

He published a newspaper, the *Saturday Press,* and was indicted under the Minnesota Act, which prohibited (a) an obscene, lewd or lascivious newspaper, magazine or other periodical or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical. Defense on the second provision (b) was enabled by the enactment if it were proven that the subject matter was published with "good motives and toward good ends."

If found guilty as a nuisance on one or both of the above provisions, the defendant was liable to permanent or temporary injunc-

8 Near v. State of Minnesota, ex rel Olson, 75 L. Ed. 1457; 51 Sup. Ct. 626 (1930).

tion, and, upon disobedience of injunction, to a fine of $1000 or 12 months in jail.

The Minnesota courts found Near guilty, and issued a permanent injunction against his newspaper on the second provision (b) of the act, with the state court holding that the statute was legally justified because it aimed at more than libel, including distribution of writings detrimental to public general welfare, particularly those tending to disturb peace, regardless of truth; that it tended to eliminate continued publication of defamatory articles against public officials and private citizens, and was meant to punish in a different sense than ordinary, because libel laws are not broad enough to cover certain situations efficiently. Further, the Act's intention was to not only suppress the offender, but to place the publisher under censorship by fine or imprisonment for continuation of wrong activity.

There was *prima facie* evidence to prove that Near had violated the statute by defamatory attacks against a special law officer, the Mayor of Minneapolis, Chief of Police, editor of a rival newspaper, members of the grand jury, the Jewish race and others. His published articles unequivocally stated that the chief of police was in league with Jewish gangsters, and that this knowledge was known, but not acted upon, by the mayor, county attorney and others concerned.

Chief Justice Holmes, on hearing the case, delivered a majority opinion, reversing judgment of the Supreme Court of Minnesota, holding in substance that the remedy for false accusations is under the libel laws, and not by suppression of the press by statute, even though the statute may show good intent. He discounted entirely the fact that the statute offered opportunity for the accused to prove truth of allegations and good motives to evade suppression. This provision could not, he said, avoid a violation against the 14th Amendment, because it left censorship in hands of the Legislature, or possibly an administrator, who may use the power detrimentally.

As to that part which legislated against disturbance of the peace, by defamation of public officials, Justice Holmes held that to prohibit the intent to excite unfavorable sentiments against government is equivalent to giving secret aid or failure to expose those who should be opposed for misconduct in office.

Justice Butler gave a dissenting opinion to the effect that freedom of press, as construed in this case, gave a meaning and scope not previously recognized, and he believed the Supreme Court should find on individual cases, not on general application of the 14th Amendment. Further, he held that the Act of the Minnesota Legislature was within its police power, and, unless proved to the contrary, was justified by conditions prevailing in Minnesota.

Butler then quoted Justice Story in another case to the effect that the 14th Amendment is not meant to cover every wild, irrational dis-

turbing, destructive publication. Rather, it guarantees the liberty to publish only what is true, with good motives and justifiable ends. Otherwise, publishers may become scourges of the republic by denouncing liberty. Butler also agreed with Minnesota statute on inadequacy of libel laws, particularly where a publisher is insolvent and pursues a course of blackmail, extortion, etc.

In conclusion, then, it appears that there are only two regulations of the press which are justified: obscene literature, and, in time of war, sedition. Even these restrictions, however, must be guarded zealously, lest they become, by devious interpretations, a threat to the continued liberty of the press.

C. G. Remmo.

THE PROCEDURE AND EFFECT OF OBTAINING A TAX DEED IN COLORADO.—The procedure followed in obtaining a tax deed in Colorado is, as it is in all other American jurisdictions, of a highly statutory nature. This being true it necessarily follows that any discussion that deals with the procurement of a tax deed must begin and end in the statute books. Although the actual procedure to be followed is not particularly involved or confusing it is purely statutory and because of the highly technical nature of such a transaction it is most important to follow the procedure outlined in the books to the letter for courts in Colorado have long adhered to the rule that any deviation from the statutory rules, either by the purchaser or by the officials conducting the deal, renders the entire proceedings invalid and consequently any deed procured under such circumstances would be void.

Because the law frowns upon the forfeiture of a man's land the procedure for obtaining a tax deed to property that is being sold for delinquent taxes has been so framed that it not only provides for an adequate redemption period but also that any departure from the procedure is fatal to the deed.

Although the purchaser of a tax deed does not as an individual participate in any of the various conditions precedent to offering the property for sale it will illustrate the strict adherence to the statutory rules that is necessary if the purchaser is to receive a valid tax deed if we examine the various rules.

The first step that is necessary to the obtaining of a valid tax deed is that the county treasurer must give notice to the owner of the land that is to be sold and this statute requires that such notice be given at a particular time of the year.[1] After complying with this requirement the treasurer must then file an affidavit that he gave notice as required [2]

1 Chapter 142, Sec. 227 Colorado Statutes Annotated, 1935.
2 Chapter 142, Sec. 229 Colorado Statutes Annotated, 1935.

and that the notice of the forthcoming sale was published in a newspaper of general circulation as required by another section.[3] The publisher of the paper in which the notice of the sale appeared must also file an affidavit,[4] and any material departure from the statutory form is not valid and renders the entire subsequent transaction void.

The time and place of the sale must also be held strictly to the statutes and any sale held after the date specified voids any deed that may subsequently be acquired. The case of *Kingore v. Wallace* serves as an apt illustration of the importance of holding the sale on the exact day for in adjudication the court said: "The sale was therefore held nine days late and for aught that appears in this record was void and the deed under it, containing no explanation of that fact was void." [5] The proposition has long been substantiated by a number of similar cases holding to the same rule. In *Hamer v. Glenn Investment Co.* the court categorically said: "The rule is that compliance with every requirement must be affirmatively shown and a deed showing a wrong date is void on its face." [6]

The actual sale of the land in Colorado is made not to the person who offers the highest price for the land but to the person who will pay the taxes and accept the least interest. Section 241 C.S.A. provides: "* * * the same shall be sold to the person who shall pay therefor the taxes, charges, costs, and penalties then due thereon, and who shall further offer to accept any lower rate or rates of interest upon the amount so paid than is required by law to be paid in order to redeem land sold for non-payment of taxes." [7] The section further provides that if no lower rate is offered than the amount for which the land is sold shall draw interest at the maximum rate as fixed by law. When the purchaser has bid the property in at such a sale the county treasurer then makes out, signs, and delivers to the purchaser a certificate of purchase that describes the property purchased, the amount of taxes and penalties paid and the rate of interest that the amount draws. Such a certificate costs the purchaser a nominal fee of fifty cents. The certificate of purchase is assignable and when such assignment is entered upon the record of sales in the office of the county clerk and treasurer vests the interest of the assignor in the assignee. After holding the certificate of purchase for a period of three years or more application may be made to the county treasurer who shall, after compliance with important conditions precedent, issue a deed and deliver the same to the holder of the certificate. Courts in Colorado have decided that one who

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3 Chapter 142, Sec. 228 Colorado Statutes Annotated, 1935.

4 Chapter 142, Sec. 230 Colorado Statutes Annotated, 1935.

5 85 Colo. 381, 276 Pac. 332, 1929.

6 75 Colo. 423, 226 Pac. 299, 1924.

7 Chapter 142, Sec. 241 Colorado Statutes Annotated, 1935.

purchases a tax certificate is not entitled to a deed until he has paid all the taxes subsequently assessed upon such land.[8]

The conditions precedent necessary to be fulfilled before a tax deed will issue are imperative and must be followed strictly if the deed is to be valid. The county treasurer must, after notice of request for a deed, give personal service to any person in occupancy and also to the person against whom the taxes were originally assessed. Such notice must be given not more than five and not less than three months before the issuance of the tax deed. If, upon a diligent inquiry, the treasurer cannot find the addresses of the person who originally owned the land and any other person having interest in the land he must publish the notice of the forthcoming issuance in a newspaper of general circulation. After complying carefully with the above requirements the treasurer must then make and file affidavits that he has done all the conditions precedent as required by the statute. The requirements as set forth in this particular section [9] are jurisdictional and proof of notice is necessary and the notice must state the truth, failing in which the deed becomes void.[10]

The deed is then signed, acknowledged and delivered to the purchaser and vests in him the fee, subject, however, to all redemption rights of minors, insane persons and all others under legal disability. Such a deed must contain certain necessary statutory recitals besides the usual prerequisites of a conveying instrument. It must recite the date and the manner of the transfer of the certificate,[11] it must recite the amount of subsequent taxes paid on the land,[12] and it also must show the date that the sale was held [13] and if it fails to do any of these the deed under which the land is held is void. It is of the greatest importance that such a tax deed be recorded immediately upon delivery for a long line of cases in Colorado hold that a tax deed does not convey any title to real estate until it has been filed for record in the proper office.[14] The deed in the hands of the grantee-purchaser is, by previous decisions, evidence of several important facts among which are that the deed is *prima facie* evidence of the title conveyed,[15] that the property described therein was subject to taxation, and the introduction in evidence of a tax deed establishes a *prima facie* title in the grantee,[16] that notice was given as required by the statutes,[17] and that

8 Schneider v. Hurt, 25 Colo. App. 335, 138 Pac. 422 (1914); Henrie v. Greenlees, 71 Colo. 528, 208 Pac. 468 (1922).

9 Chapter 142, Sec. 255 Colorado Statutes Annotated, 1935.

10 Young v. Rohan, 77 Colo. 70, 234 Pac. 694 (1925).

11 Empire Ranch v. Neikirk, 23 Colo. Appl. 392, 128 Pac. 468 (1912).

12 Ibid.

13 Hamer v. Glenn Investment, 75 Colo. 423, 226 Pac. 299 (1924).

14 Chapter 142, Sec. 258 Colorado Statutes Annotated, 1935.

15 Dyke v. Whyte, 17 Colo. 296, 29 Pac. 128 (1892).

16 Mitchell v. City of Denver, 33 Colo. 37, 78 Pac. 686 (1904).

17 Duggan v. McCullough, 27 Colo. 43, 59 Pac. 743 (1899).

the property was advertised in the manner prescribed,[18] and also *prima facie* evidence that the sale was conducted in the manner required by the law.[19] The burden of overthrowing a tax deed that is valid on its face is upon the party claiming adversely to the instrument.

When a person holds under a tax deed that is valid on its face and when all the necessary statutory conditions precedent have been fulfilled he has the fee subject only to redemption by persons under legal disability. A section of the Colorado statutes provides that any land sold for taxes may be redeemed by a minor at any time until the minor becomes of age and such a person has one year to redeem after reaching the legal age and the same section provides that any idiots or insane person shall have the right of redemption at any time within one year after the disability is removed.[20] It follows that if the deed is good on its face and the necessary statutory requirements have been met the only person who could successfully assail the holding would be a person who had been under a legal disability. If such a person would be successful in redemption proceedings he would be required to pay the person who had purchased the land all the taxes, penalties, and costs plus interest at the rate of 15 per cent per year.[21] If the purchaser has improved the land in good faith a later section provides that he receives the value of such improvements as ascertained by a board of three disinterested persons appointed by the county board of commissioners.[22]

From the above sections it is clear that if a person holds a tax deed that is fair on its face but actually some material statutory provision has not been followed he can be defeased by the owner or any one holding under him within the statutory period. To circumvent this manifest hardship for those holding under a tax deed that is fair on its face but is, nevertheless, defeasible because of a technicality, section No. 262 was passed which limits actions brought for recovery of land sold for taxes to five years after the execution and delivery of the deed. To plead this section as a defense the claimant must be holding under a tax deed that is fair on its face for an overwhelming number of cases in Colorado have decided that a tax deed void on its face does not set in motion the five year limitation.[23] A claimant, however, would be able to plead the regular statute of limitations if he holds under a void tax deed.

In recapitulation we see that in Colorado if a person holds land under a tax deed that is fair on its face and all the statutory technicalities

18 Pelton v. Muntzing, 24 Colo. App. 1, 131 Pac. 281 (1913).

19 Lovelace v. Tabor Mines, 29 Colo. 62, 66 Pac. 892 (1901).

20 Chapter 142, Sec. 265, Colorado Statutes Annotated, 1935.

21 Chapter 142, Sec. 274, Colorado Statutes Annotated, 1935 as amended in 1943.

22 Ibid.

23 Miller v. Weldon, 26 Colo. App. 108, 140 Pac. 930 (1914).