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Another Jehovah's Witness Case

CONSTITUTIONAL LAW

ANOTHER JEHOVAH'S WITNESS CASE

The city of Opelika, Alabama, filed a complaint charging petitioner with the violation of a licensing ordinance by selling books without a license and with operating as a book agent without a license. All licenses were subject to revocation at the discretion of the City Commission with or without notice. Petitioner alleged that the unlimited discretion in revocation of the license was an unconstitutional encroachment upon freedom of the press. Lower court overruled this contention and found petitioner guilty. Court of Appeals of Alabama

reversed the conviction. Supreme Court of Alabama reversed the Court of Appeals and stayed execution pending certiorari to the Supreme Court of the United States. *Held,* affirmed. The tax statute is not invalid as abridging the freedom of speech, freedom of the press or freedom of religion.[1]

The ordinance regulates the distribution of literature by use of the taxing power. Until recently the taxing power could not be used for police power purposes.[3] It is doubtful, however, that the decision in the *Opelika* case is justified under the implied extension of the taxing power for police purposes for there is no indication that the petitioners perpetrated a fraud, conducted themselves in an obnoxious manner, created any disturbance or by the distribution of their literature committed acts injurious to public morals, or created a "clear and present danger"[4] to organized society.[5]

The license and fees provided by the tax ordinance of the city of Opelika bears no relationship to the danger which may be prohibited by the exercise of police powers.[6] While it is true the use of city streets may be regulated in the public interests, no undue burden may be placed upon the dissemination of information and the free

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[1] Jones v. City of Opelika; Bowden v. City of Fort Worth; Tobin v. Arizona; 62 S. Ct. 1231 (U.S. 1942).

[2] The police power is the legal capacity of government to control the personal liberty of individuals for the protection of the general social interest. There are two requirements for a proper exercise of the power: (1) There must be a social interest to be protected which is more important than the social interest in personal liberty and, (2) there must be proper means used to accomplish the desired end. WILLIS, CONSTITUTIONAL LAW (1936) 224, 728; Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943.

[3] Originally the taxing power could be so used. McCray v. United States, 195 U.S. 27 (1904); Veazie Bank v. Fenno, 8 Wall. 533 (U.S. 1869); but in Bailey v. Drexel Furniture Company, 259 U.S. 20 (1922), the power was denied. In United States v. Butler, 297 U.S. 1 (1936) the court appears to approve a limited use of the taxing power for police power purposes.

[4] There are three tests which have been used to determine when the police power can be properly exrcised to control speech and press (1) when the words used directly urge or cause unlawful acts. Masses Publishing Company v. Patten, 244 Fed. 535, 542 (S.D.N.Y. 1917); (2) When such words have an indirect or remote tendency to cause such unlawful acts. Pierce v. United States, 252 U.S. 239 (1920); Gitlow v. New York, 268 U.S. 652 (1925); (3) When there is a "clear and present danger" that the words used will cause such unlawful acts. Schenck v. United States, 249 U.S. 47 (1919); see WILLIS, CONSTITUTIONAL LAW (1936) c. 18.

[5] See note 1, *supra* at 1246.

[6] Valentine v. Chrestensen, 62 S. Ct. 920 (1942); In the instant case the license fee was a flat fee of ten dollars a year for book agents and five dollars a year for transient distributors of books. An "issue fee" of fifty cents a license was also imposed. It is clear that the purpose of the license was a suppression of the distribution of the literature for the tax was fixed in amount and was measured neither by the extent of the petitioner's activities nor by the amount which they received for and devoted to religious purposes.

exercise of the right of free speech under the guise of regulatory taxation.[7]

Earlier the Supreme Court said that the right to act upon religious belief was subject to regulation but that the regulation could not be exercised in a manner which would unduly infringe the protected freedom.[8] This limitation seems to have been all but forgotten by the majority in this and the *Gobitis* case.[9] It justified Professor Hamilton's criticism that Justice Frankfurter "discovered though he piled up words to hide it that religious liberty is a local question."[10]

The instant case likewise falls within the criticism of Mr. Chief Justice Stone dissenting in the *Gobitis* case when he said "if we believe that such compulsion (flag-saluting) will contribute to national unity, there are other ways to teach loyalty and patriotism which are sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions."[11] This statement might be paraphrased in the instant case by observing that where a clear and present danger to organized society is not involved it is unlikely that the defendants or indeed the oppressed minorities of the world will be encouraged to accept the value of our vaunted freedoms when we hesitate to protect them ourselves.

As an exercise of police power it seems impossible to accept the majority conclusion in the *Opelika* case.

II

The exercise of police power over the freedom of speech has serious consequences in modern society. The pamphlet, a historic weapon against oppression, is today, as ever, the convenient vehicle of those with limited resources because newspaper space and radio time are expensive and the cost of establishing such enterprises great.[12] Freedom of speech and freedom of the press should not mean freedom only for those who are economically competent to distribute their broadsides.[13] If the state may tax the privilege without limit it may

[7] As the tax is fixed in amount and wholly unrelated to the extent of the defendant's activities, it is a type of tax which when applied to interstate commerce, has repeatedly been deemed unconstitutional. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); Best v. Maxwell, 311 U.S. 454 (1940).

[8] Cantwell v. Connecticut; 310 U.S. 296 (1940).

[9] Minersville District v. Vobitis, 310 U.S. 586, 603 (1940).

[10] *The Supreme Court Today* (1940) 103 NEW REPUBLIC 178, 180.

[11] Minersville District v. Gobitis, 310 U.S. 586, 603 (1940); *see* United States v. Carolene Products, 304 U.S. 144 (1938); Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Farrington v. Tokushige, 273 U.S. 284 (1927).

[12] Lovell v. Griffin, 303 U.S. 444, 452 (1938).

[13] Pamphlets were extensively used in the struggle for religious freedom. *See* GREENE, THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT (1905) 282, 283, 299 to 301.

fix the rate of tax and through the tax, control or suppress the activity which it taxes.[14]

The exercise without commercial motives, of the freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes.[15] Thus circulation taxes for the purpose of revenue were held invalid prior to the adoption of the First Amendment,[16] and today, the distribution of pamphlets for non-commercial purposes is protected from the restraint of censorship.[17] The liberty of the press guaranteed by the Fourteenth Amendment which includes pamphlets and leaflets cannot be invaded by the state.[18]

In the *Grosjean* case the court struck down as unconstitutional a tax which was not measured by the volume of advertisements—its plain purpose being to penalize publishers and curtail circulation of certain newspapers.[19] Likewise, ordinances forbidding the dissemination of information are invalid.[20] The flat license tax here involved, in its potency as a restraint on publication, falls short only of outright censorship. The more humble and needy the cause the more effective is the suppression.[21]

III

Important as free speech and a free press are to a free government and free citizenry, the right to worship according to one's own dictates is ever more dear to many individuals.[22] The present ordinance infringes that right.[23] In the *Cantwell* case a unanimous court

[14] Grosjean v. American Press Co., 297 U.S. 233, 244, 245 (1936); Magnana Co. v. Hamilton, 292 U.S. 40, 45 (1934).

[15] Cox v. New Hampshire, 312 U.S. 569 (1941).

[16] Stamp taxes for purely revenue purposes were successfully resisted in Massachusetts in 1757 and again in 1785 on the ground that they interfered with the freedom of the press. *See* DUNIWAY, FREEDOM OF THE PRESS IN MASSACHUSETTS (1906) 119, 120, 136, 137.

[17] Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

[18] McConkey v. City of Fredericksburg, 179 Va. 556, 19 S. E. (2d) 682 (1942). However, new enterprises like the movies which give entertainment but do not give expressions of opinion may be controlled by censorship. Mutual Film Corp. v. Industrial Commission of Ohio, 236 U.S. 230 (1915). In that radio gives entertainment to that extent, but not when it presents expressions of opinion, it would seem that censorship is legal. Caldwell, *Censorship of Radio Programs* (1931) 1 J. OF RADIO L. 441.

[19] Grosjean v. American Press, 297 U.S. 233 (1936). The statute here imposed a two per cent (2%) license tax on the gross receipts of any newspaper whatever having a circulation of more than 20,000 copies per week for the privilege of enjoying such business of selling advertisements whether printed or published. Louisiana Acts 1934, n. 23, § 1.

[20] Hague v. C. I. O., 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939).

[21] See note 1, *supra*, at 1245.

[22] Cantwell v. Connecticut, 310 U.S. 296 (1940). See LEE, HISTORY OF THE METHODISTS (1810) 48.

[23] The right of freedom of religion and worship necessarily implies the right to gain converts. While perhaps not so orthodox as the

held invalid a law which required a license for the solicitation of funds for religious purposes.[24]

It is admitted that the immunity which press and religion enjoy may be lost when they are united with other activities not immune,[25] but the dissemination of ideas educational and religious, and the collection of funds for the furtherance of those purposes are protected.[26] Imposing taxes on the dissemination of ideas relating wholly to religious matters for which only a small fee is asked in an attempt to gain converts had been held to violate the Fourteenth Amendment.[27]

These struggles for religious liberty have had a long history culminating in the statements of policy in the Northwest Ordinance of 1787,[28] and the First Amendment of the Federal Constitution.[29] Religious freedom must contemplate some freedom to act, otherwise religious freedom is a meaningless term.[30] The doctrine of the *Gobitis* case which leaves control over such action to the legislatures, denies to many political, religious, and racial minorities the protections on which our democracy was founded.[31] Such a doctrine is fraught with danger.

It is obvious that if the present taxes are sustained, a way has been found for the effective suppression of speech and press despite constitutional guarantees. Such were the moving causes of the Revolutionary War.[32] Liberty of conscience is too full of meaning for individuals in this nation to permit taxation to prohibit or impair the spread of religious ideas, even though they are controversial and run contra to the established notions of a community.[33]

IV

Assuming the validity of the substance of the ordinance the pro-

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oral sermon, the use of religious books is an old recognized and effective mode of worship and conversion. LEE, HISTORY OF THE METHODISTS (1810) 48.

[24] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[25] Valentine v. Chrestensen, 62 S. Ct. 920 (1942).

[26] Cantwell v. Connecticut, 310 U.S. 296, 304 to 307 (1940); Schneider v. State, 308 U.S. 147 (1939).

[27] McConkey v. City of Fredericksburg, 179 Va. 556, 19 S. E. (2d) 682 (1942); State v. Greaves, 112 Vt. 222, 22 A. (2d) 497 (1941); City of Blue Island v. Kozul, 379 Ill. 511, 41 N. E. (2d) 515 (1942).

[28] Art. I: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in said territories."

[29] "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . . "

[30] Fennell, *The Reconstructed Court* (1941) 19 N. Y. U. L. Q. REV. 31.

[31] WHIPPLE, OUR ANCIENT LIBERTIES (1927) 140 ff.

[32] See 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND (3d ed. 1882); COBB, RISE OF RELIGIOUS LIBERTY IN AMERICA (1902).

[33] Many of the "accepted" religions of today were looked upon as fanatical and injurious less than a century ago. See, LITTLE, IMPRISONED PREACHERS AND RELIGIOUS LIBERTY (1938); LEE, HISTORY OF THE METHODISTS (1810).

cedure for the revocation of license issued under it condemns it as unconstitutional.[34]

The license required by the *Opelika* ordinance was revocable at the unrestrained and unreviewable descretion of the licensing commission without cause and without notice or an opportunity to be heard. Generally a license may not be revoked without notice or hearing if the occupation or activity serves some useful purpose and if the pursuit of such activity affords but slight opportunity for the infliction of substantial injury to the public health, safety, morals or convenience.[35]

Thus the *Opelika* ordinance denies the petitioner procedural due process because the petitioner's activities did not injure or threaten to injure public health, safety or morals.[36] The freedom of religion which the constitution purports to safeguard cannot be subjected to uncontrolled administrative action. Indeed the Supreme Court of the United States has previously held that a license to be issued at the sole discretion of municipal officers is void,[37] because it makes enjoyment of the freedom of the press contingent upon the uncontrolled will of administrative officers. Nevertheless, in the instant case the unrestricted power to revoke licenses was sustained. To say that the withholding, at will and without cause, of a license is an exercise prohibited by the constitution but that the revocation of a privilege without cause and opportunity to be heard is a valid exercise of power is an anomaly to say the least.

TAXATION

MULTIPLE TAXATION OF INTANGIBLES

Testator died domiciled in New York. At the time of his death he owned stock of a Utah corporation represented by stock certificates in his possession in New York. Utah imposed a tax on the transfer by death. Administrators of the estate filed suit, claiming this was a violation of due process. *Held*, there is no constitutional immunity from multiple taxation. The state of incorporation has jurisdiction to tax transfer by death of shares of stock owned by a non-resident.[1]

The decisions of the present Supreme Court are based on the

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[34] Notice and opportunity to be heard are generally required for the refusal to grant a license. Bratton v. Chandler, 260 U.S. 110 (1922). The tribunal must be impartial. Tumey v. Ohio, 273 U.S. 510 (1927). These requirements apply to administrative as well as judicial proceedings. Lloyd v. Elting, 287 U.S. 329 (1922); Note (1934) 34 COL. L. REV. 332.

[35] Note (1926) 4 WIS. L. REV. 180, 186. Likewise there must be citation before hearing and hearing or opportunity of being heard before judgment if private rights are involved.

[36] *Ex parte* Robinson, 19 Wall. 505, 513 (U.S. 1873).

[37] Lovell v. Griffin, 303 U.S. 444 (1938).

[1] Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 86 L. Ed. 911 (1942).